



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable

Case no: 4222/2021

In the matter between:

JAN HENDRIK GUNTER

Plaintiff

and

THE MINISTER OF POLICE

Defendant

Coram: Van Rhyn J

Heard: 1 and 2 August 2023, 12 March 2024

6 and 7 August 2024, 16 September 2024

Delivered: 29 November 2024

ORDER

1. The Defendant is held liable for the damages that the Plaintiff have suffered in consequence of the incident that occurred on 6 October 2020 when a stun grenade was detonated by the Defendant which caused permanent damage to the plaintiff's hearing.
2. The defendant shall pay an amount of R 757 561.00 in regard to the Plaintiff's claims for:
 - 2.1 Past Medical Expenses R1 460.00
 - 2.2 Future Medical expenses R356 101.00
 - 2.3 General Damages R400 000.00

3. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs to date of this order which shall include the Plaintiff's counsel fees on scale B as provided for in Rule 67A read with Rule 69 and the reasonable qualifying fees and expenses (where applicable) of the following experts:
- 3.1 Me Ancois Botha;
 - 3.2 Mr Deon Ceronio;
 - 3.3 Mr Ian Walsh

JUDGMENT

[1] The plaintiff, Jan Hendrik Gunter, a farmer from the district of Senekal, Free State Province, instituted action against the defendant, the Minister of Police, for damages arising from an assault perpetrated against him by a member of the South African Police Service ('SAPS') when a stun grenade was thrown and detonated in close proximity of him, as a result of which he suffered permanent damage in the form of loss of hearing in both his ears.

[2] The action, which is defended by the defendant, initially proceeded on merits only. The issue of quantum was separated from the merits in terms of rule 33(4) of the Uniform Rules of Court. During the trial in respect of the merits the parties, however, agreed to present evidence regarding the quantum of the plaintiff's claim with the result that both the merits and the quantum stand to be adjudicated.

[3] In the particulars of claim the plaintiff alleged that on 6 October 2020 at Landdros Street, Senekal, a member of SAPS, whose identity is unknown to the plaintiff (the 'member'), acting within the course and scope of his employment with the defendant, threw a stun grenade at the plaintiff. The plaintiff avers that the defendant is responsible for the conduct of members and/or officials and/or employees, acting within the course and scope of their employment and whose object were to prevent, combat and investigate crime, maintain public order, protect and secure the inhabitants of the Republic of South Africa and to uphold and enforce the law.

[4] The plaintiff alleged that the member threw the stun grenade at the plaintiff and other members of the public, without any reason and/or justification and/or in a reckless, negligent and in an unlawful manner, while he ought to have foreseen that if he acted in such a manner, such conduct might result in members of the public suffering injuries and that they may consequently suffer damages. The member, illegally and unreasonably, impaired the plaintiff's constitutional rights by assaulting and/or injuring him whereas the member owed the plaintiff a duty of care, alternatively had a duty not to injure the plaintiff unreasonably, illegally and/or negligently in the execution of his duties as an employee of the defendant. As a result of the explosion of the stun grenade, the plaintiff suffered permanent damage as set out above, which he seeks to recover in the action.

[5] The plaintiff claims damages in the amount of R2 601 460 made up as follows:

- (a) General damages in respect of suffering and/or discomfort, loss of amenities of life and disability in the amount of R600 000;
- (b) Past medical expenses in the amount of R1 460; and
- (c) Future medical expenses in the amount of R2 000 000.

Total R2 601 460.

[6] To appreciate the evidence adduced by the defendant, it is apposite to have regard to the pleadings and specifically paragraph 7 of the defendant's plea. The defendant denies that it breached his duty of care and/or acted negligently or recklessly or without reason or justification. The defendant, in particular, denies that the plaintiff sustained the injury in question as a consequence of any conduct by members of the SAPS. The defendant admitted that stun grenades were used by members of the SAPS at the time of the incident. The defendant further pleads that members of the SAPS used the stun grenades to disperse the crowd that forced its way into the Magistrates' court premises without permission. It is specifically denied that the members threw a stun grenade towards the plaintiff. The defendant pleads that the stun grenade was thrown towards the crowd. In addition, the defendant pleaded the following as grounds of justification:

- (a) There were reasonable grounds by members of the defendant in thinking that, because of the crowd's behaviour (of which the plaintiff was part or alternatively in the vicinity of), there was such a danger (commenced or imminent) of injury to persons or damage to/or destruction of property as to require their action complained of; and

(b) The means used in such endeavour to restore law and order and avert such danger, and resulting in damage to state property and/or one or more members of the crowd being injured, was not excessive having regard to all the circumstances, such as the nature and the extent of the danger, the likelihood of serious injury to persons, the value of the property threatened and life at risk.

(c) In the further alternative, the plaintiff voluntarily assumed the risk in that the plaintiff had knowledge of the risk of injury in participating in the violent crowd or entering and passing through the violent crowd and therefore consented to possible injury.

[7] The plaintiff testified during the trial and presented the evidence of four witnesses. Plaintiff is a farmer and BKB stock agent. He was born on 21 February 1982. On the day in question the plaintiff attended a gathering by members of the community and more specifically, members of the farming community, held at an open space between the Senekal Magistrates' court and the taxi rank. The gathering against farm murders coincided with the bail application of the accused arrested in connection with the murder of a young farm manager and farmer, Brendin Horner. The plaintiff parked his motor vehicle at point F, an area indicated and marked on the plaintiff's evidence bundle, Exhibit A. Exhibit A4 is a map (downloaded from Google Maps) of the specific area in Senekal where the Magistrates' court is located. Point F on exhibit A4 is situated to the southern end of Landdros Street. The gathering took place at point D, which is located to the north of point F also in Landdros Street. He arrived at the gathering at approximately 10:00. Several leaders in the farming community addressed the members of the community who attended the gathering. The members of the community who attended the gathering were referred to as the 'farmers' or the 'crowd' during the trial. The gathering lasted for approximately 45 minutes to one hour.

[8] When the gathering adjourned, the crowd moved in a northern direction from point D towards the side entrance of the Magistrates' court, marked point C on Exhibit A4. The plaintiff had arranged telephonically with his cousin, Mr Louis Slabbert ('Mr Slabbert') from Frankfort, to meet him subsequent to attending the gathering. The plaintiff walked along Landdros Street in a northern direction, he passed the side entrance of the Magistrates' court, turned to the right at the corner and passed the main entrance of the Magistrates' court, (point B on Exhibit A4). He thereafter turned left and proceeded to Afgri Retail ('Afgri') located in Zuider Street. When he passed the main entrance of the Magistrates' court, he noticed a large group of the

farmers entering the premises and gathering at the entrance to the court building. He did not notice any violent behaviour. The plaintiff indicated the area where he met Mr Slabbert at Afgri and marked same as point E on Exhibit A4. According to the plaintiff it took him approximately 10 minutes to walk from point D to Afgri. He and Mr Slabbert talked while standing on the pavement at Afgri.

[9] Approximately 10 minutes after meeting up with Mr Slabbert he heard loud noises emanating from the direction of the Magistrates' court. It sounded similar to two gun shots. According to the plaintiff he spent approximately an hour with Mr Slabbert at Afgri before retracing his steps back to the Magistrates' court in order to return to his vehicle at point F. When the plaintiff reached the area next to the Magistrates court in the vicinity of the side entrance, he noticed a friend, Mr Atkinson who was sitting in his motor vehicle across the street from where he was walking. The plaintiff then crossed Landdros Street, from east to west, to meet with Mr Atkinson. While he was standing next to the parked Land Rover of Mr Atkinson, he noticed a Nyala police vehicle (the 'Nyala') reversing in a northern direction in Landdros Street. He then heard two loud explosions. It felt as if someone was forcefully striking him with bare hands on his back. For a couple of seconds, it was quiet and thereafter a ringing sound in his ears started and his hearing has been affected negatively. The ringing sound has not ceased since then. He subsequently learned that a stun grenade was thrown from the Nyala, which caused two loud explosions. The plaintiff testified that the stun grenade was thrown at approximately 12:30. After the explosion, the Nyala sped away in a southern direction in Landdros Street

[10] The plaintiff estimated that approximately 15 people were still present in Landdros Street at the time when he met with Mr Atkinson. There were no violent behaviour or actions, nor any uproar or clashes between the SAPS and the farmers who attended the meeting. Many of the farmers and members of the public had already left the area. Those who were still in the area, interacted peacefully. Motor vehicles were moving up and down in Landdros Street whereas the street was closed off for traffic by SAPS during the gathering and the events that unfolded at the Magistrates' court earlier that morning.

[11] During the trial the court had the opportunity to view video footage of the scene at the time when the stun grenade was thrown from the Nyala. The following is a summary of the footage: The videographer stood to the north of the side entrance to the Magistrates' court

(point C) in Landdros Street while recording the footage. The image depicted is a section of the pavement of Landdros Street (eastern side), to the left of the videographer, the tarred road surface and a few vehicles parked next to the pavement on both the west side and eastern side of Landdros Street. The videographer is facing to the south, being the direction in which the plaintiff walked on his way to his vehicle parked at point F. While referring to the video footage, the plaintiff indicated that he was walking on the left side of Landdros Street, wearing a jean and black cap. He ran across the street to the right to meet with Mr Atkinson and can be seen standing next to, what can be described as the driver's window of a white Land Rover, which is facing in the direction of the videographer.

[12] A Nyala then passes the videographer on his right-hand side and stops. The Nyala can be seen reversing in Landdros Street from south to north. A white sedan vehicle passes the videographer, driving in a southern direction, a motor horn is heard and then the sedan vehicle passes the Nyala. A person is standing with the top part of his body protruding from the Nyala. The person then throws an object, which is confirmed to be a stun grenade, and white smoke appears to the left of the screen. The Nyala then speeds off in a southern direction in Landdros Street. Approximately four to six people, mostly men, can be seen walking from the left and the right and looking in the direction of the departing Nyala. It is common cause that the person who threw the stun grenade while standing in the Nyala is Sergeant Sithole, a member of the SAPS.

[13] According to the plaintiff he always hears a ringing sound which is extremely disturbing when he is in the presence of other people and more so at night when everything is silent. When he attends auctions, which is part of his job description, he encounters difficulty in hearing the auctioneer. His interaction with his children and other people has been adversely affected due to his loss of hearing and the constant ringing sound in his ears.

[14] During cross-examination it was put to the plaintiff that, at the time the stun grenades were thrown by the members of the SAPS, the crowd was out of control and the court building and windows were already damaged. A police-vehicle was burning. The stun grenades were thrown by the SAPS to disperse the crowd. The plaintiff denied the version put to him and responded that the video footage clearly shows that at the time when the stun grenade was thrown towards him, that was not the situation.

[15] During re-examination Mr Groenewald, counsel on behalf of the plaintiff, placed on record that the defendant's version pertaining to the grounds for justification was not put to the plaintiff. The plaintiff denied that a stun grenade was used due to the crowd's behavior, of which it is alleged he was a part of, nor that there were reasonable grounds for the defendant in thinking that a danger existed or was imminent of injuries to persons or damage or destruction of property. The plaintiff testified that no vehicles were burned in his presence and nobody's life was at risk. He did not enter the court premises on the particular day.

[16] Mr Simon Frederick Stemmet ('Mr Stemmet') testified that he attended the gathering against farm murders on 6 October 2020. He arrived at 10h30 and according to him the farmers and members of the public who attended the gathering left at approximately 11h00. After the gathering some of farmers went inside the court building at the main entrance. Thereafter, approximately 5 minutes later, two shots were fired. The farmers exited the court building. They remained at the court and moved to the side of the building. He noticed a police vehicle that had been overturned. It was set alight. A Nyala tried to reverse into the court premises at the side entrance but was blocked and pushed back towards the street by the crowd. This happened at around 11h45 to 12h00.

[17] Mr Stemmet explained that not all the farmers who gathered in protest of farm murders moved towards the court. He did not notice the plaintiff entering the court building. Subsequent to the incident where the Nyala was pushed out of the court premises at the side entrance, the farmers calmed down and many left. According to him, approximately 15 to 20 people remained behind and stood in the vicinity of the side entrance. The farmers mingled and talked to each other for approximately 20 minutes. The Nyala that was pushed out of the premises by the farmers had by then left and it went in the direction of John du Plessis Street towards the industrial area, which is to the south of the Magistrates' court.

[18] Mr Stemmet testified that he was standing in Landdros Street, just in front of the gate to the side entrance to the Magistrates' court, and was talking to Mr Andre Pienaar ('Mr Pienaar') who also attended the gathering and addressed the farmers earlier that morning. He was standing next to Mr Pienaar's vehicle when a Nyala, approaching from behind, came around the corner and passed them. The Nyala stopped. It reversed and a stun grenade was thrown from the Nyala. According to Mr Stemmet the people standing in Landdros Street at the time, ran away. The stun grenade fell approximately 5 to 10 meters away from the plaintiff and to the right of Mr Pienaar's vehicle in Landdros Street. The stun grenade was thrown at

approximately 12h30. He identified himself on the video footage that was shown to him during the proceedings and indicated that he was standing to the left of a Ford Ranger, next to the front passenger window. The Ford Ranger is parked next to the pavement in Landdros Street (on the eastern side), facing in a southern direction. To the south, in front of him, is the side entrance to the court. He furthermore identified the plaintiff who moved across the street, from behind the Ford Ranger, to the Land Rover of Mr Atkinson. He pointed out when the Nyala passes the Ford Ranger and proceeds in a southern direction. He furthermore indicated the motor vehicle of Mrs Daleen Cronje, a Toyota, who was passing the Ford Ranger of Mr Pienaar and driving in a southern direction. The Nyala stopped in Landdros Street and then reversed whereafter the stun grenade was thrown from the top of the Nyala. The stun grenade landed in Landdros Street. According to Mr Stemmet, no danger existed at that stage and everything had already calmed down.

[19] During cross examination Mr Stemmet conceded that a group of farmers were involved in damaging the windows of the court building and causing havoc earlier that morning. According to his observations, Mr Pienaar encouraged and incited the farmers to enter the court building and to remove the suspects in the Brendin Horner case. He agreed that the farmers became violent. He explained that after the Nyala was pushed out at the side entrance to the court premises, the farmers calmed down and dispersed. He reiterated that the video footage clearly shows that Landdros Street was open for traffic and everything was peaceful when the stun grenade was thrown from the Nyala.

[20] Mr Louis Abraham Francois Slabbert ('Mr Slabbert') testified that he resides at Frankfort and attended the gathering held against farm murders on the day of the incident. He arrived at the gathering at approximately 09h00. The speeches started at around 10.00 and lasted between 45 minutes to an hour. On his way to his vehicle, that was parked at Afgri in Zuider Street, he passed the main entrance to the court building. He noticed some of the farmers but they were gathering in a peaceful manner. He corroborated the version presented by the plaintiff regarding their interaction and the time spent together on the particular day.

[21] The plaintiff furthermore presented the testimony of Mr Deon Ceronio ('Mr Ceronio'), an audiologist, registered with the Health Professions Council of South Africa. He has been practicing as such in Bloemfontein since 1997. He completed a tinnitus training course in 2000. He was commissioned to compile reports subsequent to examining the plaintiff on more

than one occasion. Mr Ceronio testified that the plaintiff suffered from an acoustic trauma occasioned by the high noise level when he was exposed to the detonation of a stun grenade. A sudden hearing loss that occurs after an explosion is also associated with a ringing sound in the ears, referred to as tinnitus, that can be of a temporary or permanent nature, depending on the decibel levels of the explosion. In the plaintiff's case there is a constant permanent ringing in his ears. The tinnitus was measured at 800Hz and correlates with his exposure to excessive noise. The hearing loss indicated on the audiogram is consistent with sudden noise exposure, such as an explosion

[22] Mr Ceronio is of the opinion that the plaintiff will most likely be in need a hearing aid within the next five to eight years. He will have to undergo a hearing test on an annual basis. The defendant filed a notice in terms of Rule 39(a) and (b) of a speech and hearing therapist, Nomsa L Masoka dated 4 March 2024 which was admitted into evidence by agreement between the parties. Ms Masoka opined that the plaintiff presents with bilateral mild to moderate sensorineural hearing loss as a result of acoustic trauma and that the hearing loss is permanent and irreversible.

[23] The plaintiff presented the testimony of Me Ancois Botha who is a specialist in clinical and forensic investigations in the field of trauma and abuse. After completing her Master's Degree in Social Work Forensic Practice at the University of the North West during 2019 she has been specialising in clinical forensic investigations and has assessed the plaintiff regarding complaints that he has been struggling to sleep and are irritated easily since the incident on 6 October 2020. She opines that the plaintiff may experience long-term emotional or mental health problems as a result of being exposed to an explosion which can be referred to as a traumatic event. This concluded the evidence presented in the plaintiff's case.

[24] Mr Abraham Paulus Kemp was the only witness to give oral testimony on behalf of the defendant. He was a member of the SAPS for 26 years and was a lieutenant colonel at the time of the incident. Since November 2016 he served as commander at the Public Order Police Unit at Bethlehem. He had been a station commander at several police stations prior to the incident at Senekal. At the time of his testimony in court he had retired from service. He was involved in securing the safety of the public and that of the suspects, who had been arrested and scheduled to appear at their bail hearing on the day of the incident. Captain Phetlane was the operational commander of the members who were deployed to manage the

situation at the Magistrates' court and he was the overall commander. The members of the SAPS were advised of the scheduled gathering by members of the farming community prior to the day of the incident. According to Mr Kemp, approximately 1500 farmers gathered at the taxi rank next to the Magistrates' court premises where they were addressed by certain leaders in the farming community.

[25] The gathering by the farmers lasted from 10h00 to 11h15. He was informed that the farmers were instigated by the last speaker to take action which entailed that they should enter the court building, remove the suspects and to deal with them by themselves. Counsel on behalf of the defendant requested leave to lead the testimony of Mr Kemp regarding certain hearsay evidence on a provisional basis. No objection was made to the request and the hearsay evidence was placed on record on a provisional basis. It was furthermore placed on record that Warrant Officer Erasmus, who was stationed at the Magistrates' court that morning, made the reports to Mr Kemp regarding the events that took place at the meeting and at the court building.

[26] Subsequent to receiving a report that the farmers had entered the court building and were causing havoc and destruction, Mr Kemp left the Joint Operational Centre ('JOC') to attend to the situation unfolding at the Magistrates court. According to his estimation approximately 500 farmers had already entered the premises at the Magistrates' court. Some of the rowdy farmer's had entered the court building and had caused damage to the courtrooms. Mr Kemp estimated those who caused the damage and havoc to be approximately between 30 and 50 farmers. He received a report that the crowd tried to open the holding cells where the two suspects were held. The crowd of troublemakers had already broken the windows and endeavoured to remove the bars to the holding cells. Mr Kemp had by then arranged for the removal of the two suspects and was able to convince the crowd to refrain from causing further damage due to the fact that the suspects had already been removed from the holding cell.

[27] While he was still at the holding cells, he received a report that a police vehicle had been overturned by the crowd and the vehicle was set alight. He ran to the scene and tried to convince the troublemaking farmers not to cause further damage, but to no avail. Mr Kemp explained that the police vehicle was standing near to the main entrance to the court. The situation was chaotic and out of hand. He threw a stun grenade in an attempt to stop further damage to the police vehicle whereafter Captain Phetlane and his members started to push

back the troublemakers through the gate. In the meanwhile, he arranged for a Nyala (the 'first Nyala') to enter the courtyard where suspects and prisoners are on- and off-loaded. It is apposite to mention at this stage that confusion ensued during the testimony of Mr Kemp pertaining to which Nyala was the first and which was the second Nyala. In an attempt to avoid further confusion, the first Nyala as explained above, will throughout this judgment be referred to as the first Nyala with the result that the Nyala that was called as backup and thus entered the scene at a later stage will be referred to as the 'second Nyala'. The security gates were closed behind the first Nyala. The troublemakers were throwing stones at the members of the SAPS. According to Mr Kemp the first Nyala arrived at court at approximately 12h15.

[28] At approximately 12h30 he called for the second Nyala to escort the first Nyala, conveying the two suspects, due to the fact that the farmers were trying to overturn the first Nyala. According to Mr Kemp he was able to identify two groups of farmers. One group was trying to overturn the first Nyala and the second group was standing at the gate to the side entrance of the Magistrates' court. The second group of farmers closed the gate to the court's premises and tried to prevent the Nyalas from exiting the premises. Between 500 and 800 farmers were standing at the gate. The second Nyala entered at the side entrance of the Magistrates court. Mr Kemp explained that no specific instruction to throw a stun grenade was given over the radio to Sergeant Sithole. He would have heard if such instruction was given at the relevant time. An operation member may however decide to act in a specific manner with the result that Sergeant Sithole was able to make a decision to throw the stun grenade having regard to the specific circumstances.

[29] During cross examination Mr Kemp testified that the street passing the Magistrates' court was blocked off for traffic on the particular day. However, early that morning vehicles had already parked in Landdros Street prior to the members of SAPS blocking the road. The Nyalas were utilised to block off Landdros Street with the result that they were in close proximity to the court when summoned. He arrived at the Magistrates' court at approximately 11h45. He called for the first Nyala at approximately 12h05. He estimated the time of arrival of the first Nyala at around 12h10 to 12h15. Subsequent to receiving the report from Warrant Officer Erasmus that a police vehicle was set alight, he endeavoured to extinguish the fire with fire extinguishers obtained from within the court building. Mr Kemp explained that the burning vehicle was at the other side of the court building.

[30] Thereafter he called for the second Nyala to arrive. The second Nyala arrived about ten minutes later, at approximately 12h40. The second Nyala entered the court premises at the gate the side entrance. At approximately 12h45 the obstacles in front of the gate to the courtyard and holding cells, placed there by the troublemakers, were removed and the two suspects were taken out of the holding cells and placed inside the first Nyala, which by then was still parked within the courtyard. The second Nyala then reversed out of the court premises at the side entrance, at around two to three minutes later, being at approximately 12h48.

[31] As the second Nyala approached the gate the farmers blocked the Nyala and tried to overturn it by lifting it sideways. The situation was hectic and chaotic. Approximately 30 farmers tried to overturn the Nyala. Mr Kemp explained that the majority of the farmers who attended the gathering earlier that morning acted peacefully and did not partake in any violent action. The troublemakers attempted to close the gate to stop the Nyalas from exiting the court premises. The second Nyala was moving slowly to exit the gate at point C. It took a further approximately three minutes. This happened at approximately 13h00. As soon as the second Nyala reached Landdros Street it turned to the left and waited for the first Nyala to exit the premises at the court. The first Nyala also turned to the left. The second Nyala waited in close proximity for the first Nyala to arrive and exit the gate, approximately five meters from the gate. At that stage the same group of farmers also tried to overturn the first Nyala. The first Nyala kept on moving while the farmers tried to overturn it. Some of the troublemakers were on the pavement in the proximity of the side entrance. Many bystanders were standing in the street.

[32] Mr Kemp testified that the second Nyala then slowly moved away from the scene. He was unable to explain why the second Nyala, called for backup and to escort the first Nyala, would leave the scene while the farmers were trying to overturn the first Nyala. According to him he assumed that the driver of the second Nyala was under the impression that the first Nyala had already exited the gate and that they should leave the area as soon as possible. He assumed that the driver of the second Nyala, Sergeant Sithole reversed to be in close proximity of the first Nyala in order to protect the first Nyala. The first Nyala was able to enter Landdros Street at approximately 13h05. It was put to Mr Kemp that many innocent bystanders were attending the gathering outside the court premises and did not partake in the chaotic and violent activities on the day in question. Mr Kemp agreed. He explained that

the danger situation, at that stage, existed at the gate where the troublemakers tried to overturn the first Nyala conveying the suspects. According to his observation, the stun grenade was thrown towards the gate in an attempt to disperse the troublemakers. Mr Kemp initially testified that as soon as the stun grenade was thrown the crowd moved away. Yet, he later added that when the stun grenade was thrown the troublemakers still attempted to overthrow the first Nyala. Only after the first Nyala followed the second Nyala everything became peaceful.

[33] Some of the members of the SAPS were issued with stun grenades on the day in question. The stun grenade was thrown just before the first Nyala entered the street and while it was moving slowly towards Landdros Street at a stage when it was in between the gate and the street, on the pavement section. After the stun grenade was thrown, the crowd dispersed and the first Nyala was able to exit the gate, enter into Landdros Street and the two Nyalas left the scene, the one following the other with a distance of approximately 20 meters in between the two Nyalas. This occurred at approximately 13h10. The first Nyala had to move extremely slowly because many people were standing in the street in the vicinity of the side entrance to the court premises. Mr Kemp was unable to see where the stun grenade landed due to the fact that his view was obstructed. According to Mr Kemp, approximately 80 to 100 people were still standing outside the gate to the side entrance of the court. Vehicles would not have been able to pass the area in Landdros Street due to the presence of the crowd and bystanders.

[34] When the video footage was shown to Mr Kemp during cross-examination, it became apparent that he was unsure where the side entrance and where the main entrance to the court, referred to as point C and point B respectively, are situated. It therefore remained uncertain where exactly the incident pertaining to the police vehicle that was set alight, actually occurred. It only later appeared that the police vehicle was parked inside the court premises, but in close proximity to the side entrance and not the main entrance. It furthermore appeared that Mr Kemp was unsure exactly where the side entrance to the court was situated having regard to the scene depicted in the video footage. He testified that, according to his observations, the side entrance to the court is actually situated behind the Ford Ranger parked to the left (or easter side) of Landdros Street. According to him the chaotic situation thus unfolded behind the Ford Ranger, in other words, it was not captured by the videographer. Mr Kemp conceded that the plaintiff was standing away from any violent crowd.

He furthermore conceded that a peaceful situation is displayed on the video footage and there is no indication of any crowd present in the street passing the Magistrates' court on the images depicted in the video footage. Furthermore, only one Nayla can be seen driving off in a southern direction, away from the Magistrates' court. It was put to Mr Kemp that either a third stun grenade was thrown at a stage when he did not witness the events or either he is not telling the truth, because his evidence is refuted by the images depicted in the video footage. Mr Kemp denied that he is not telling the truth regarding the prevailing situation when the stun grenade was thrown by Sergeant Sithole.

[35] The defendant's case was closed subsequent to the testimony of Mr Kemp. The parties agreed to allow the hearsay evidence presented by Mr Kemp in respect of the information he received from Warrant Officer Erasmus. The parties furthermore agreed that, should the plaintiff prove the need for future medical expenses, the court should accept the amount of R356 101 as calculated by the defendant's actuary and included in the 'Expert Bundle' during the trial.

[36] The lawfulness of the assault (the detonation of the stun grenade), the justification for the assault (necessity and assumption of risk) and damages are in dispute. The fact that a stun grenade was thrown by Sergeant Sithole on the day of the incident is not in dispute. According to the defendant, two stun grenades were utilised by the members of SAPS to disperse the crowd that had forced its way into the court's premises without permission. It is furthermore common cause that the defendant is vicariously liable for the actions of his members and in particular for the actions of Sergeant Sithole, who according to the defendant, is the member who caused the detonation of the second stun grenade.

[37] It is trite that, every infringement of bodily integrity is *prima facie* unlawful and once the infringement is proved, the onus rests on the wrongdoer (the defendant) to prove a ground of justification.¹ The plaintiff must allege and prove the fact of physical interference.² The plaintiff testified that immediately after the detonation of the stun grenade he experienced severe hearing loss. His hearing has been impaired since then. Mr Ceronio as well as Ms Masoka, as per the expert report submitted into evidence by agreement between the parties, opined

¹ *Moghamat v Centre Guards CC* [2004] 1 All SA 221 (C) at [7], citing *Mabaso v Felix* 1981 (3) SA 865 (A) at 873E – 874E.

² *Bennet v Minister of Police* 1980 (3) SA 24 (C) at 34-35.

that the plaintiff presents with bilateral mild to moderate hearing loss as a result of acoustic trauma caused by the detonation of a stun grenade. Having regard to the expert evidence submitted by the plaintiff and the defendant, there is no reason to reject the plaintiff's evidence that the detonation of a stun grenade, being a sudden high noise exposure, by the SAPS on the day in question caused the hearing loss and tinnitus.

[38] The State has a constitutional obligation to protect individuals against criminal acts or violence of third parties. Failure to do so may give rise to delictual liability.³ The onus to prove a justification for the assault accordingly falls on the defendant. In *Petersen v Minister of Safety and Security*⁴ it was held that: 'A state of necessity exists when the defendant is placed in such a situation that he can only protect his interest by violating the interests of an innocent third party. Whether a state of necessity existed in a particular set of circumstances is a factual question.' In considering the plaintiff's version of the events, the member of the SAPS threw the stun grenade towards the plaintiff without any reason and/or justification in a reckless, negligent and unlawful manner. If the version of the plaintiff regarding the events is accepted, the enquiry turns to the reasonableness of Sergeant Sithole's conduct and ultimately if the defendant should be held liable for such conduct.⁵ The determination of wrongfulness by the use of breach of a legal duty does not entail a new test, it involves the determination of the objective reasonableness of the conduct of the person who acted in light of the prejudice he caused to another person, in *casu* the plaintiff. Consequently, the question whether a legal duty has been breached is also determined with reference to the *boni mores* or general legal conviction of the community. The defendant admitted that it had a legal duty to take reasonable steps to prevent or limit injury to the public who attended the gathering held on the day of the incident.

[39] Plaintiff was, in my view, an excellent witness. His evidence was consistent throughout and he remained unshaken during cross-examination. He was not present at the Magistrates' court when the group of farmers entered the premises and, what is evidently common cause between the parties, caused havoc and destruction of the State's property by firing shots within the court building, breaking windows, setting a police vehicle alight and endangering the safety and security of the suspects at the court on the day of the incident. Mr Stemmet

³ *Minister of Safety and Security v Van Duivenboden* [2002]3 All SA 741 (SCA), 2002 (6) SA 431 (SCA).

⁴ [2007] 2 All SA 177 (C) at [19].

⁵ *Minister of Safety and Security v Ntamo and Others* 2003 (1) SA 547 (SCA).

confirmed the testimony of Mr Kemp in this regard. The plaintiff's testimony that he left the gathering at the site next to the taxi rank, walked along the side- as well as the main entrance to the court in Landdros Street to meet Mr Slabbert is uncontested. Mr Slabbert corroborated the plaintiff's version that they met at Afgri situated in Zuider Street, which is approximately two or three blocks away from the Magistrates' court as is evident from Exhibit A4. Both the plaintiff and Mr Slabbert heard a commotion and two gun shots being fired which, according to their observation, came from the direction of the court.

[40] From the evidence presented by Mr Stemmet and Mr Kemp it is evident that a confrontational situation existed between the troublemakers and the SAPS. The submission in argument by the defendant is that the evidence of Mr Kemp proves that the actions by the members of the SAPS on the day in question were justified and satisfies the requirements of necessity as a ground for justification. However, Mr Kemp testified that he was standing inside the courts' premises when Sergeant Sithole threw the stun grenade. His version is that the first Nyala was still trying to move into Landdros Street and had not yet reached the second Nyala when the stun grenade was thrown. The stun grenade was thrown after the second Nyala had pulled away from the gate to the side entrance, stopped and reversed. Regarding the reason why it was necessary to utilise the stun grenade at that particular point in time, Mr Kemp testified that ". . . I think to prevent the people to block the Nyala to get the way open so that the second Nyala can go through." He was not able to see where the stun grenade landed, whether it was in Landdros Street or on the pavement. According to his observations the situation was chaotic and the farmers caused havoc which led to the decision of Sergeant Sithole to make use of a stun grenade. Mr Kemp contradicted himself when he later in cross-examination testified that the situation did not become peaceful immediately after the stun grenade was thrown. He then testified that the farmers were still trying to overturn the first Nyala subsequent to the detonation of the stun grenade.

[41] The testimony of the plaintiff, Mr Stemmet and Mr Slabbert is in direct contrast to the evidence presented by the defendant on this aspect. According to the plaintiff, Mr Stemmet and Mr Slabbert the situation prevailing at the Magistrates' court, more specifically in Landdros Street when the stun grenade was thrown by Sergeant Sithole was calm, peaceful and untroubled. The version presented by the plaintiff is that the havoc and destruction of property that was caused earlier, between approximately 11h10 to 12h10, while the plaintiff was meeting with Mr Slabbert at Afgri, had calmed down by the time when he returned to the scene

on his way to his motor vehicle. Accordingly, when he stood next to Mr Atkinson's Land Drover at approximately 12h30, there was no need for the SAPS to utilise a stun grenade to disperse the farmers or troublemakers.

[42] The version of the plaintiff and defendant are destructive to one another. Whether either party has discharged the onus upon it depends in the first instance on whether or not its version of the events can be said to be more probable than that of the other party. The court in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Cie SA and Others*⁶ held that when a court is faced with two conflicting versions, the court must make findings on the following: -

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

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

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

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

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

⁶ (4/01) [2002] ZASCA 98 (6 September 2002) at paragraph [5], pp 4-5.

[43] As indicated above, the evidence presented by the plaintiff pertaining to the events that unfolded on the particular day at Senekal cannot be criticized. The plaintiff and the witnesses called by the plaintiff made a good impression on me and their evidence was clear, logical and reliable. On the other hand, Mr Kemp, who was called to explain the actions of the SAPS at the stage when the stun grenade was thrown by a fellow member of the SAPS, created a poor impression on me. He appeared uneasy and he struggled to present a clear account of the events that unfolded at the time when the stun grenade was thrown by Sergeant Sithole. Mr Kemp, understandably, was unable to explain the rationale for the decision of his colleague, Sergeant Sithole, to utilise a stun grenade at the particular moment. He made assumptions when questioned about the decision to make use of a stun grenade having regard to the prevailing situation and circumstances. Therefore, the reasoning and decision taken by Sergeant Sithole to make use of a stun grenade remains unsure.

[44] Confusion was created by Mr Kemp when referring to the first and the second Nyala, only to change around his description of the two Nyalas during his testimony. He was unsure where the side gate and the main gate to the court were situated. It appeared as if he had no knowledge about exhibit A4 before he was called to testify in court. He was adamant regarding the time frames regarding to the events that unfolded during the day in question. Yet he conceded during cross examination that he did not have a clear recollection of the exact time pertaining to the events and are making assumptions and estimations pertaining to the time these incident occurred. As Mr Groenewald remarked while cross-examining Mr Kemp, the incidents appeared to have occurred in spurts of approximately two, three or four minutes apart.

[45] The video footage shown during the trial greatly assisted the court to follow the evidence presented by the plaintiff and Mr Stemmet. Mr Stemmet testified that he was standing behind the gate to the side entrance of the court. He identified himself as the person standing to the left of the Ford Ranger, being on the pavement in front of the Magistrates court. The version presented by Mr Kemp is that the crowd that gathered at the gate to the side entrance is not visible on the video footage due to the fact that the gate is situated to the back of the videographer. This version was never put to any of the witnesses who testified in the plaintiff's case. In any event, Mr Kemp indicated that he is unsure where the gate to the side entrance is located. On this basis the version of the plaintiff that the gate to the side

entrance (point C) is located to the left as seen on the video footage is more probable, even though I emphasize that the gate *per se* is not visible.

[46] No disruptive behaviour, nor any indication of havoc or chaos is visible on the video footage. There is no indication that a Nyala exited the gate at the side entrance of the court, and no indication that a Nyala followed in close pursuit of another Nyala. Only one Nyala passes the court premises in Landdros Street from behind Mr Stemmet, the plaintiff and the videographer. I agree with the submission by Mr Groenewald that the video footage clearly and undoubtedly refutes the version presented by the defendant regarding the circumstances that existed at the time when the stun grenade was thrown by Sergeant Sithole. In any event, if approximately 80 to 100 people were standing in the vicinity of the side entrance, surely, they would have been distinctly visible on the video footage. Furthermore, the version regarding the number of people who were standing at the side entrance at the time was also not put to the plaintiff of any of the plaintiff's witnesses.

[47] It is noteworthy that neither Captain Phetlane nor Sergeant Sithole was called to testify during the trial. There is of course no principle or rule of practice that all available witnesses must always be called. The correct course of action depends on all the circumstances. The failure to call a witness who is available and able to testify to the facts on a disputed issue merits the inference that the party fears that the evidence will expose facts unfavourable to that party. But this is true only when the evidence is available and when it would indeed elucidate the facts. The question whether an adverse inference is to be drawn from the failure to call a witness is a question of fact.⁷ The only reasonable inference that the court can draw under the circumstances is as enunciated in *In Elgin Finedays Ltd v Webb*⁸: "... it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him ...".

[48] In my view the failure to call these two witnesses impacts negatively upon the defendant's case. Captain Phetlane was, according to the version presented by Mr Kemp, present at the side gate when the farmers endeavoured to overturn the Nyala. Therefore, Captain Phetlane would have been able to confirm the version of the defendant that the

⁷ *Elgin Fireclays Limited v Webb* 1947 (4) SA 744 (A) at 749 to 750.

⁸ 1947 AD 744 at 745

utilisation of the stun grenade to disperse the violent crowd was indeed called for and necessary under the prevailing circumstances. Mr Kemp speculated about the exact reason why Sergeant Sithole threw the stun grenade. Ultimately, it was Sergeant Sithole who made the decision to throw the stun grenade and he is the person who should have testified why he believed that he was justified in acting as he did. No explanation was furnished by the defendant for this failure.

[49] Relevant in this regard is the testimony of the plaintiff, Mr Stemmet and Mr Slabbert pertaining to the exact time when the stun grenade was detonated by Sergeant Sithole. The evidence presented in the plaintiff's case was that this happened at approximately 12h30. This version was not disputed whereas Mr Kemp's version is that the stun grenade was thrown at approximately 13h10. Mr Kemp became confused as to the issue whether the incident pertaining to the detonation of the stun grenade occurred prior to or after 13h00 and had to be reminded regarding his previous estimations of the time on several occasions during his testimony.

[50] It is apposite to quote from the *locus classicus* on cross-examination, *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*⁹:

'[61] The institution of cross-examination not only constitutes a right; it also imposes certain obligations. As a general rule, it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.

[62] The rule in *Browne v Dunn* is not merely one of professional practice but 'is essential to fair play and fair dealings with witnesses. It is still current in England and has been adopted and followed in substantially the same form in the commonwealth jurisdictions.

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged

⁹ 2000 (1) SA 1 (CC).

but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.'

[51] The plaintiff's evidence pertaining to the time when the stun grenade was thrown was not disputed, nor was the defendant's version as to what time the incident with the stun grenade occurred put to the plaintiff or any of his witnesses. It is not difficult to appreciate the tangible prejudice that the plaintiff stands to suffer if the testimony regarding the time of the events presented by the defendant is accepted when the defendant's version in this regard was not put to the plaintiff or his witnesses during cross-examination. The testimony of Mr Stemmet that the dangerous situation at the court existed when damage to the State's assets was caused and the safety and security of the suspects were endangered existed at approximately 11h45 to 12h00 was not challenged by the defendant.

[52] Having regard to the credibility of the factual witnesses, their reliability and the probabilities of the version presented by the parties, the version presented by the plaintiff is more probable than that of the defendant. In the circumstances of this case and I am satisfied that the action of the SAPS in throwing a stun grenade at the time when the plaintiff stood next to the Land Drover of Mr Atkinson, was conclusively wrongful. I am furthermore of the view that the conduct of Sergeant Sithole cannot be described to have been necessary in order to disperse a dangerous crowd nor was a legal interest of the defendant endangered in any way. A dangerous situation did not exist, nor was such a situation imminent at the time when the stun grenade was thrown. The harm that was caused to the plaintiff was not caused in circumstances of necessity. Sergeant Sithole acted unreasonable under the prevailing circumstances.

[53] In *Petersen v Minister of Safety and Security*¹⁰ it was held as follows:

'[11] Can it be said that in these circumstances the police action which caused Justin's injuries does not attract liability because it was justified in circumstances of necessity? Unlike self-defence – also referred to as private defence – the defence of necessity does not require that the defendant's action must be directed at a wrongful attacker. There was therefore no need for the respondent to establish that Justin was himself part of the attacking crowd. What the respondent had to prove in order to establish the justification defence of necessity, appears, for example, in broad outline, from the

¹⁰ [2010] 1 All SA 19 (SCA).

following statements in "Delict volume 8(1) Lawsa (2ed) by J R Midgley and J C van der Walt, paragraph 87: "An act of necessity can be described as lawful conduct directed against an innocent person for the purpose of protecting an interest of the actor or a third party . . . against a dangerous situation.... Whether a situation of necessity existed is a factual question which must be determined objectively . . . a person may inflict harm in a situation of necessity only if the danger existed, or was imminent, and he or she has no other reasonable means of averting the danger . . . The means used and measures taken to avert the danger of harm must not have been excessive, having regard to all the circumstances of the case . . ."

[54] Regarding the defence of *volenti non fit iniuria*, the video footage clearly supports the version presented by the plaintiff that a dangerous situation did not exist, nor was such situation imminent at the time when the stun grenade was thrown by Sergeant Sithole. In this regard I reject the contention on behalf of the defendant that the plaintiff had knowledge of the risk of injury in that he heard shots when he met with Mr. Slabbert at Afgri and yet he returned to the vicinity of the Magistrate's court and therefor consented to such a risk.

[55] The plaintiff sustained physical injury as a consequence of the conduct of the defendants' employee. This gives rise to an inference of wrongfulness and there exists no justification or excuse for the infliction of such injury. What remains is the issue of culpability. The issue is whether the common cause facts are able to sustain an inference of negligence on the part of the member of the SAPS who threw the stun grenade towards or in close proximity to the plaintiff. If the member knew or could reasonably have foreseen the possibility of harm to the plaintiff and a reasonable person in the position of the member would have foreseen the possibility of harm being caused to such person, and would have guarded against such, it would be *prima facie* negligent to cause the detonation of the stun grenade.

[56] The members of the SAPS had a legal duty to act reasonably towards the members of the public who were standing in the street at the side entrance to the court building. In causing the detonation of the stun grenade at that time, they would have been in breach of the legal duty to act reasonably towards the plaintiff, in particular, as well as the other members of the public who were still standing in Landdros Street and on the pavement. I am not convinced that the nature and degree of the force utilised by the defendant under the prevailing circumstances, was reasonable in order to achieve any lawful purpose. I agree with the submission on behalf of the plaintiff that a reasonable police officer in the position of Sergeant

Sithole would not have caused the detonation of a stun grenade at the time when the plaintiff stood next to the vehicle of Mr Atkinson and no dangerous situation existed. In the circumstances, the causing of bodily harm to the plaintiff was wrongful. The harm was clearly foreseeable and ought reasonably to have been avoided. In the circumstances it was negligent to act in such a way. In absence of a lawful excuse for the detonation of the stun grenade, and none has been established, the conduct of the defendant was both wrongful and negligent.

[57] In the result, the defendant has not discharged the *onus* of establishing that the conduct of the police officer which caused the plaintiff's injury was not wrongful and was justified by necessity.

[58] Regarding the quantum of the plaintiff's claim, regard is had to the evidence of the plaintiff and the contents of the expert reports submitted during the trial. The only issue that remains for adjudication is the amounts to be awarded under the claims of General Damages and Past Medical Expenses. The amount claimed for future medical expenses has been agreed between the parties to be R 356 101. The plaintiff relied upon the award in *Silberbauer v Santam Insurance Co. Ltd and Another*¹¹ where the vice-principal of a girls' school, aged 42, had, as a result of a collision sustained a basal fracture of the skull with blood and cerebrospinal fluid leaking from her left ear, leaving her with deafness and tinnitus in the left ear, recurrent headaches and vertigo in case of a sudden movement of the head. She sustained a fracture of the clavicle and multiple abrasions and contusions, all of which caused her considerable pain during her ten days stay in hospital. She sustained permanent deafness of the left ear. An amount of R4 800 was awarded in 1966 which currently amount to R527 000.¹²

[59] The plaintiff furthermore referred the court to *Singh v African Guarantee & Indemnity Co Ltd*¹³. The plaintiff, a 46 year old storeman clerk had been involved in a collision and sustained the following injuries: a deep abrasion on the right leg at the mid shin level, an abrasion on the left shoulder, and a small abrasion on the occiput or back of the head which caused almost total deafness in both ears. He was admitted to hospital for two days and thereafter attended hospital as an out-patient for some thirteen months. The court found that

¹¹ 1966 (112) QOD 712 (C).

¹² C Potgieter, *The Quantum of Damages in Bodily and Fatal Injury Cases Quick Guide*, Juta (14th ed), p 16.

¹³ 1958(112) QOD 303 (O).

the deafness was a grave infliction. In 1963 an amount of R2 200 was made which would be equal to an amount of R263 000 in 2024.¹⁴

[60] No submissions pertaining to the quantum of damages to be awarded were made on behalf of the defendant. Having regard to previous awards made for loss of hearing, the injuries and sequelae sustained by the plaintiff as set out in the expert reports which ultimately leaves the plaintiff with mild to moderate high frequency permanent hearing loss and tinnitus, I am of the view that an amount of R400 000 for General Damages in respect of suffering and/or discomfort, loss of amenities of life and disability will represent fair and reasonable compensation. Regarding the claim for past medical expenses incurred by the plaintiff in the amount of R1 460, proof of payment of the account of M Ceronio dated 23 February 2021 was appended to the particulars of claim as annexure 'C'. I am therefor satisfied that his claim in this amount should succeed.

[61] As to costs, there is no reason why the costs should not follow the result.

ORDER

[62] In the result the following order is made:

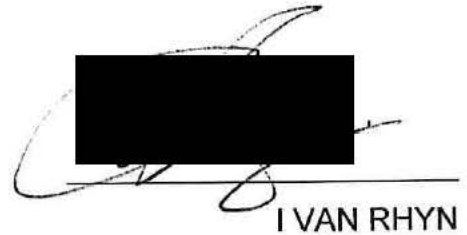
1. The Defendant is held liable for the damages that the Plaintiff has suffered in consequence of the incident that occurred on 6 October 2020 when a stun grenade was utilised by the Defendant which caused permanent damage to the plaintiff's hearing.
2. The defendant shall pay an amount of R 757 561.00 in regard to the Plaintiff's claims for:
 - 2.1 Past Medical Expenses R1 460.00
 - 2.2 Future Medical expenses R356 101.00
 - 2.3 General Damages R400 000.00
3. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs to date of this order which shall include the Plaintiff's counsel fees on scale B as provided for in Rule 67A read with Rule 69 and the reasonable qualifying fees and expenses (where applicable) of the following experts:

¹⁴ The Quantum of Damages, Quick Guide, Ibid at p 16.

3.1 Me Ancois Botha;

3.2 Mr Deon Ceronio;

3.3 Mr Ian Walsh



I VAN RHYN

JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Plaintiff:

Instructed by:

ADV. W J GROENEWALD
SYMINGTON DE KOK ATTORNEYS
BLOEMFONTEIN

On behalf of the defendant:

Instructed by:

ADV. N. M PHAKAMA
STATE ATTORNEYS
BLOEMFONTEIN