

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

Reportable

Case no: 2081/2020

In the matter between:

SIMON MOLEFI MONARENG¹

Plaintiff

and

THE MINISTER OF POLICE²
Defendant

Neutral Citation: *Monareng v Minister of Police* (2081.2020) [2025]
ZAFSHC 229 (5 August 2025)

Coram: Opperman J

Heard: 18 July 2023, 2 November 2023, 22, 23 & 26 January 2024, 10, 11 &
13 September 2024 and 6 December 2024

¹ ‘Monareng’/ ‘plaintiff’.

² ‘Defendant’.

Delivered: The judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand down is deemed to be 5 August 2025 at 17h00.

Summary: Trial – merits – arrest – alleged unlawful/negligent shooting.

ORDER

The plaintiff's claims are dismissed on the merits and with costs, inclusive of costs of two counsel to be taxed on scale C in terms of uniform rule 67A. Costs shall include all costs reserved.

JUDGMENT

Opperman J

*Introduction*³

[1] The matter at hand revolves around the complex and often controversial issue of police's use of force during arrest in South Africa, particularly in the milieu of violent crime and high-risk suspects.

³ Abbreviations:

SAPS: South African Police Service.

SPECIAL TASK FORCE: Special Task Force/Task Force.

CPA: Criminal Procedure Act.

IPID: Independent Police Investigative Directorate.

KZN: KwaZulu-Natal.

ALEO: Airborne Law Enforcement Officer.

VISPOL: Visible Policing and Operations.

LCRS: Local Criminal Record Centre.

VCIU: Vehicle Crime Investigation Unit.

[2] This judgment scrutinises the circumstances involving members of the SAPS in a shooting incident with the plaintiff and considers whether the use of force complied with South African law.

[3] The scenario comprises an operation aimed at apprehending a suspect beforehand identified as a participant in criminal activities, such as cash-in-transit armed robbery, multiple homicides, the murder of police officers, and attempted murder of other law enforcement personnel.

[4] The incident that took place on 16 May 2019 occurred within the context of ongoing investigations into the crimes mentioned. Intelligence reports indicated that the high-profile and dangerous suspect was present in a stolen vehicle *en route* from KZN to Gauteng.

[5] During the incident that gave rise to the case, the vehicle was driven by the plaintiff, Monareng. The defendant maintains that the vehicle was fleeing from the police and in the process, shots were fired at the police from said vehicle. In contrast, the plaintiff maintains he was under the impression that they were being hijacked and denied any knowledge of shooting from the vehicle he was in. The plaintiff seeks damages in respect of the supposedly wrongful and unlawful shooting by members of the SAPS.

[6] The balance to be maintained is between society's requirement for effective policing in response to violent crime and the fundamental rights of all individuals,

including suspects, as provided by the South African Constitution.⁴ Botha and Visser⁵ captured the dilemma aptly when they noted that:

‘Members of the police in South Africa are burdened with a Constitutional duty to prevent, investigate and combat crime, a duty to maintain law and public order, and to ensure the protection and security of all South Africans. This is no easy task, as South Africa boasts with some of the gravest crime statistics in the world.

Police power to arrest is vital in the implementation of this duty to combat crime but is also a concept demanding careful balancing of the suspect’s rights to dignity, life, and freedom and security of person, with society’s entitlement to the same rights. The use of force while effecting arrests is legitimate in most systems of law. However, what normally gives rise to dispute, is the degree of force to be permitted.’ (Accentuation added.)

[7] Van der Walt,⁶ after extensive exploration of the dilemma, rightly noted that the SAPS has much material to draw from and she, among others, highlighted the judicial position set out in judgements such as *Govender v Minister of Safety and Security* (Govender) and *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* (Walters).⁷ She concluded that the fight against crime is one of the five top priorities of the South African government, but the battle will

⁴ Section 205(3) of the Constitution of the Republic of South Africa of 1996 (Constitution). Also see the Constitution at ss 10: Human Dignity, 11: Life and 12: Freedom and security of the person. See also Burchell *South African Criminal Law & Procedure* 198; Du Toit *et al. Commentary on the Criminal Procedure Act* 5-25; Hiemstra *Criminal Law and Procedure* Chapter 5, Arrest 49, *Use of force in effecting arrest*, last updated: March 2025 - SI 18.

⁵ R Botha and J Visser ‘Forceful arrests: an overview of section 49 of the Criminal Procedure Act 51 of 1977 and its recent amendments’ (2012) *PER* 26 para 1. Footnotes not included.

⁶ T Van der Walt ‘The use of force in effecting arrest in South Africa and the 2010 bill: a step in the right direction?’ (2011) *PER* 1.

⁷ *Govender v Minister of Safety and Security* (342/99) [2001] ZASCA 80; 2001 (4) SA 273 (SCA); 2001 (2) SACR 197 (SCA); 2001 (11) BCLR 1197 (SCA) (1 June 2001) and *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* (CCT28/01) [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC); 2002 (2) SACR 105 (CC) (21 May 2002).

be lost unless further progress is made with regard to the use of force by the SAPS in effecting arrest. She wrote that the court stressed in *Walters*⁸ that the State:

‘. . . is called upon to set an example of a measured, rational, reasonable and proportionate response to anti-social conduct and should never be seen to condone, let alone to promote, excessive violence against transgressors . . .’

[8] The case proceeded solely on merits under a rule 33(4) order. Liability had to be determined first, as the parties agreed to separate merits and quantum. The defendant acknowledged responsibility for proving the lawfulness of its employees’ conduct and accepted the duty to begin the trial.

[9] I will begin by outlining the current state of the law, which will serve as the framework for the adjudication of the case. The summary of the evidence adduced is, inevitably, extensive.

Law: Use of force in effecting arrest

[10] It is an unobjectionable fact in law that the use of force, even deadly force, in effecting arrests is unavoidable in certain situations.⁹ Van der Westhuizen J, writing for the Constitutional Court in *Loureiro and Others v Invula Quality Protection (Pty) Ltd*,¹⁰ directed to the preamble of the Constitution that calls for our people to be protected. He noted in no uncertain terms that there is a disturbingly dark side to the oft-stated miracle of our constitutional democracy. He

⁸ Ibid para 47.

⁹ Footnote 5.

¹⁰ *Loureiro and Others v Invula Quality Protection (Pty) Ltd* (CCT 40/13) [2014] ZACC 4; 2014 (5) BCLR 511 (CC); 2014 (3) SA 394 (CC) (20 March 2014) paras 1-3.

went on to state that South Africa is plagued by crime, often viciously violent, sometimes sophisticated and organised, often ridiculously random, but always audacious and contemptuous of the values we are supposed to believe in and the human rights enshrined in our Constitution; perhaps not unlike other young democracies.

[11] Counsel for the plaintiff is correct when he stated that every infringement of bodily integrity is *prima facie* unlawful and once the infringement is proved, the onus rests on the wrongdoer to prove a ground of justification. The question is what is a measured, rational, reasonable and proportionate response to anti-social conduct, as was called for in *Walters*. The facts of the case will guide the conclusion and s 49 of the Criminal Procedure Act 51 of 1977 (CPA) has come to set the parameters wherein the final judgment lies.

Section 49 of the CPA

[12] In 2012, s 49 of the CPA codified the dichotomy to be cured after the Constitutional Court in *Walters* made a declaration of unconstitutionality of some aspects of the previous legislation. The 2012-amendment that still applies, reads as follows:

‘49 Use of force in effecting arrest

(1) For the purposes of this section—

- (a) “arrestor” means any person authorised under this Act to arrest or to assist in arresting a suspect;
- (b) “suspect” means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and

- (c) “deadly force” means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.
- (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if—
- (a) the suspect poses a threat of serious violence to the arrestor or any other person; or
- (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.
- [S. 49 substituted by s. 7 of Act No. 122 of 1998 w.e.f. 18 July 2003 and by s. 1 of Act No. 9 of 2012 w.e.f. 25 September 2012.]’

The Walters case

[13] In *Walters*, Kriegler J provided a respected set of factors for police officials to consider when making arrests. For ease of reference, I will refer to these factors as the *Walters*-list. Critically, however, he quoted the *dictum* by Chaskalson J in *S v Makwanyane and Another*:¹¹

‘Self-defence is recognised by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. This is consistent with s 33(1). [The equivalent of section 36 of the (final) Constitution.] To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life... *The law solves problems such as these through the doctrine of*

¹¹ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 6 (June 1995).

*proportionality, balancing the rights of the aggressor against the rights of the victim, and favouring the life or lives of innocents over the life or lives of the guilty. But there are strict limits to the taking of life, even in the circumstances that have been described, and the law insists upon these limits being adhered to.'*¹² (Accentuation added.)

[14] The *Walters*-list sets out the following points:¹³

- 'a) The purpose of arrest is to bring before court for trial persons suspected of having committed offences.
- (b) Arrest is not the only means of achieving this purpose, nor always the best.
- (c) Arrest may never be used to punish a suspect.
- (d) Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.
- (e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.
- (f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.
- (g) Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.
- (h) Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrester or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.
- (i) These limitations in no way detract from the rights of an arrester attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.'

¹² Ibid para 138 as cited in *Walters* para 53.

¹³ *Walters* para 54.

Section 49

[15] The s 49-list decrees what is considered by the legislator to be reasonable and proportionate use of force:

- a) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees;
- b) when it is clear that an attempt to arrest him or her is being made;
- c) the suspect cannot be arrested without the use of force;
- d) the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing;
- e) in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if the suspect poses a threat of serious violence to the arrestor or any other person;
- f) *or* the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm;
- g) *and* there are no other reasonable means of effecting the arrest, whether at that time or later.

Is the test subjective or objective?

[16] *A crucial question is whether the test showed above is subjective or objective when the Court decides a claim as in the instance.* I align myself with the conclusion on their research by Burring and Reddi¹⁴ that the test is both subjective

¹⁴ P Burring and M Reddi 'Section 49, lethal force and lessons from the De Menezes shooting in the United Kingdom' (2013) 46(4) *De Jure* 928.

and objective. They referred to the De Menezes Killing in the United Kingdom and the IPCC Stockwell One Report:¹⁵

‘3 4 The Relevant Law

The IPCC set out the relevant law and its application to the incident. The relevant United Kingdom legislation that was applicable under the circumstances, was section 3(1) of the Criminal Law Act, 1967, which states:

“A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or persons lawfully at large.

The IPCC interpreted this to mean that the test to be applied to a person who relies on the above section, or the common law principles of self-defence, is a subjective one. In other words, the determination to be made is: *“what is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another”*.

*Whilst the IPCC report went on to say that the “test is entirely subjective; it is the honest perception of the person using force in self-defence which matters”, it is submitted that the test contains an aspect of an objective element. This is because although the courts guard against armchair judgments, they nonetheless assess situations like this to ensure that the force used by the person was reasonable in the circumstances. This is similar to the approach adopted in South Africa, where the courts apply the subjective test to the state of mind of the person, but apply an objective test as a limitation in determining the lengths to which a person can react in any given situation.*¹⁶ (Accentuation added.)

[17] The reality is that both parties maintained their own subjective perspectives regarding the circumstances in the case here. Even if both accounts, on the

¹⁵ Report by the Independent Police Complaints Commission in the United Kingdom on the investigation into the shooting of JC de Menezes at Stockwell underground station in London. This report is available online at <http://policeauthority.org/metropolitan/downloads/scrutinities/stockwell/ipcc-one.pdf>. Accessed on 28 July 2025.

¹⁶ Footnote 14 at 939.

subjective test, are accepted by the court, what should be the conclusion in this case? The fact that the plaintiff was under the impression that he was fleeing from hijackers shows that *he was fleeing and trying to escape the hijackers*. From the perspective of the members of the Task Force, *he was fleeing and trying to escape arrest*.

[18] The conduct of the members that effected the arrest and caused the incident that brought the case before court is on trial, not that of the plaintiff. *Their subjective observations, objectively measured to the conspectus of evidence, is the test.*

What may be regarded by the arrestor?

[19] The conduct by the Task Force members was, *inter alia*, informed by the information they were briefed on. *The scenario, information and facts that existed before, during and after the incident are crucially relevant*. This includes the information about the plaintiff and the facts that were established *ex post facto* that confirmed the severity, or not, of the situation that prevailed. It may not be ignored, as the plaintiff argued. This is a real example of a comprehensive view of evidence that stretches beyond the few minutes of the event that caused the impasse.

[20] Slotting in with the above, it has been decreed in the matter of *Biyela v Minister of Police*¹⁷ that the suspicion *need not be based on information that would subsequently be admissible in a court of law*. Hearsay evidence is admissible.¹⁸

¹⁷ *Biyela v Minister of Police* (1017/2020) [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) (1 April 2022).

¹⁸ *Ibid* para 38.

The context and effect of the consequences of the force applied

[21] The plaintiff has brought this matter before the court due to the consequences of the incident. The plaintiff sustained a single gunshot wound to his lower leg. The injury resulted in the amputation of the plaintiff's leg above the knee. He is claiming R13 500 000 from the defendant. The implications of the injury must be considered within context: the loss of the plaintiff's leg does not innately and automatically entitle him to R13 500 000 nor does it necessarily establish unlawful conduct by the Task Force members; context remains crucial in the law of evidence. Again, on the facts in *casu*, it might be irrelevant what the plaintive subjectively supposed and experienced. He is not on trial – the members of the Special Task Force are.

Common cause

[22] It is common cause that:

- a) The defendant is vicariously liable for the conduct of the SAPS members;
- b) at all material times, these policemen who shot at the plaintiff acted within the course and scope of their employment with the defendant;
- c) the plaintiff was shot once in his lower leg during the course of the incident;
- d) the incident occurred near the intersection of the R57 and the R82 roads near Sasolburg, in the jurisdiction of this Court during the late evening of 16 May 2019;
- e) the plaintiff was the driver of a Ford Ranger double cab, with registration number DR[...];
- f) the vehicle was travelling from KZN south coast in the direction of Vanderbijlpark, Gauteng;

- g) the plaintiff was with Sibusiso Menyuka and Nulutandu Xulu;
- h) the plaintiff and the defendant are *ad idem* that the plaintiff was fleeing from the pursuing vehicle(s), but for different reasons supposed. The objective fact remains that he was fleeing.
- i) the incident occurred within a brief span of time marked by danger, rapid developments, heightened tension and split-second decisions.

Pleadings

Plaintiff

[23] Counsel for the plaintiff depicted their pleadings as follows in their heads of argument:

‘THE PLEADINGS

3. The plaintiff pleaded that:

- 3.1. The members who shot the plaintiff acted unlawfully, alternatively negligently;
- 3.2. In the event of it being found that the members were justified in the use of firearms, they were negligent in the use of the firearms by:
 - 3.2.1. Failing to: (sic)
 - 3.2.2. Avoid the shooting of the plaintiff when by the exercise of reasonable care and skill they could and should have done so;
 - 3.2.3. Aim their firearms at the tyres of the vehicle in which the plaintiff was travelling;
 - 3.2.4. Have due regard for the safety of the occupants in the vehicle;
 - 3.2.5. Satisfy themselves that the use of firearms was necessary in the circumstances;
 - 3.2.6. Take reasonable measures to effect an arrest or stop the vehicle without having to resort to the use of firearms;
 - 3.2.7. Adequately identify themselves as policemen;

3.2.8. Using excessive force.’

[24] Although it was not pleaded, counsel for the plaintiff subsequently raised the following points in the same heads of argument:

‘79. The members did not:

79.1. Effect a legal arrest within the ambit of sections 39¹⁹ and 40²⁰;

79.2. Legally resort to the use of force and deadly force within the ambit of section 42;²¹

80. Alternatively:

80.1. The use of firearms by the members constituted obvious causal negligence;

80.2. The plaintiff did not voluntarily assume the risks associated with the injury or negligently contributed thereto.’

[25] The issue of the legality of the arrest in terms of ss 39 and 40 described above will, for obvious reasons, not be entertained by this Court. It is substantial and will cause grave prejudice to the defendant and the administration of justice if it is regarded at this late stage of the litigation. If I am wrong not to entertain it, the facts will, in any event, show that they did indeed comply with the law during the arrest in this regard. It was never canvassed during the trial, but the evidence suffices.

[26] Harms²² summarises the issue concisely:

¹⁹ ‘39 Manner and effect of arrest.’

²⁰ ‘40 Arrest by peace officer without warrant.’

²¹ ‘42 Arrest by private person without warrant’ is not applicable here.

²² D Harms *Civil Procedure, Civil Procedure in the Superior Courts, Part B High Court*, UNIFORM RULE 18 RULES RELATING TO PLEADING GENERALLY. Last Updated: March 2025 - SI 81, *Benson and Simpson v Robinson* 1917 WLD 126, Uniform Rule 18(4), *SA Onderlinge Brand Versekeringsmaatskappy v Van den Berg* 1976 (1) SA 602 (A).

‘B18.1 Introduction

...

The whole purpose of pleadings is to bring to the attention of the court and the other parties in clear terms what the issues in the case are and on what essential facts reliance will be placed. Subsidiary functions of pleadings are to formulate the issues in a manner that will enable the court to determine the duty to begin and onus of proof and that, once judgment is given, the judgment will be a bar to a re-litigation of the same issues. ...’

Defendant

[27] The defendant denied each and every allegation of the plaintiff’s particulars of claim and pleaded that:

- a) The plaintiff was the driver of a motor vehicle who refused to stop the said vehicle when it was clear that the members of the SAPS required him to do so;
 - b) the police officers pursued the plaintiff’s motor vehicle and the plaintiff or the occupants thereof wrongfully and unlawfully opened fire on the police officers while they were being pursued;
 - c) the plaintiff and the occupants of his motor vehicle were reasonably suspected of having committed an offence and also committed offences in the presence of the police officers by, amongst other things, wrongfully and unlawfully shooting at them with firearms;
 - d) the plaintiff continued to flee when it was clear that the police officers were attempting to arrest him;
-

- e) the police officers were unable to stop the vehicle driven by the plaintiff and had no other option but to use force to stop the vehicle which the plaintiff was driving;
- f) the plaintiff could not be arrested without the use of force;
- g) the force used was reasonably necessary and proportional in the circumstances;
- h) at all material times the police officers acted lawfully and were arrestors as defined in s 49(1)(a) of the CPA and the plaintiff was a suspect within the meaning of s 49(1)(b) of the CPA;
- i) the arresting officer was a peace officer as defined in the CPA;
- j) the plaintiff committed offences in schedule 1 of the CPA in the presence of the police officers.
- k) In the alternative, the defendant pleaded that the plaintiff had full knowledge of the following facts: He was being pursued by police officers while driving his motor vehicle; the police officers required him to stop the motor vehicle; the plaintiff, despite the above knowledge, continued to flee from the police officers; the plaintiff and the occupant of his motor vehicle then also wrongfully and unlawfully shot at the police officers with firearms while they were pursuing the plaintiff. The plaintiff was fully aware of the risks involved in fleeing from the police who were trying to stop him; and shooting at the police. The plaintiff appreciated that the police may use force that was reasonably necessary and proportional in the circumstances to bring the plaintiff's vehicle to a standstill and/or while acting in self-defence as a result of them being wrongfully and unlawfully fired upon. Despite this knowledge, and while appreciating the risk, the plaintiff nevertheless persisted with his aforementioned conduct in fleeing from the police officers and also shooting at them, as aforesaid.

Issues for adjudication

[28] The primary issues to be determined in this case are:

- a) Did the SAPS members possess a reasonable belief that the use of lethal force was necessary in the circumstances?
- b) Was the force used proportional to the threat posed by the suspects?
- c) Were less drastic means of effecting the arrest available and feasible?
- d) Did the conduct of the police violate the constitutional or statutory rights of the plaintiff or other occupants of the vehicle?

Evidence in summary

[29] The parties did not make any opening statements. The defendant made use of the so-called trial bundle as the evidence was presented and evolved. The evidence adduced must be summarised here *a quo* as thoroughly as possible. The evidence was wide-ranging and extensive. I will depict it later hereunder. The oral evidence, in introduction and summary, consisted of the following witnesses, who will forthwith be referred to by their last names:

- a) Johann Renken: He is the investigating officer in the case that is the cause of the arrest. Renken is employed by the SAPS in the Directorate for Priority Crime Investigations and is stationed within the National Priority Violent Crimes Unit in Pietermaritzburg. At the time of his testimony, he had over twenty-nine years of service in the police, including service in the directorate since 2006. He was in this position during the incident in 2019.

- b) Keith Austin Wessels: He is a SAPS Lieutenant Colonel stationed at the Umgungundlovu District Office in KZN. He has thirty-nine years' experience in the SAPS. He took the s 204-statement from one of the vehicles' occupants, Menyuka, who was apprehended on the day of the incident. The statement is in regard to an incident that happened in the Nongoma area in KZN.
- c) Tebalo Jonas Masilo: Masilo is a Captain in the SAPS based at the Special Task Force in Pretoria. He is a veteran policeman with twenty-three years' experience. He has twenty-one years' experience in the Special Task Force. He was in charge of the operation on the evening of the incident.
- d) Meshack Motlhoioa: He has been in the SAPS for twenty-one years, having started his career in 2003. Fourteen years of his career has been in the Special Task Force. He was involved in the operation at the time of the incident.
- e) Aaron Simon Kabini: He has been employed in the SAPS for twenty-one years and is stationed at the Special Task Force in Pretoria. He was also involved in the operation as a member of the Task Force.
- f) Renata Rosie Khunou: She is a Lieutenant Colonel stationed at the SAPS Airwing in Bloemfontein. She qualified in 2012 and has been attached to the SAPS Airwing since 1 May 2014. This is a special unit in the SAPS and specifically deals with air support for the ground police. She was involved in the 16 May-operation to arrest Menyuka in her capacity as the pilot of the helicopter.
- g) Remember Maboko: He is a Sergeant in the SAPS that joined the police in 2009 and has been a member of the Airwing since 2014. He served as a so-called ALEO (airborne law enforcement officer) on the helicopter that was piloted by Lieutenant Colonel Khunou.
- h) Ngaka Frans Mokoena: During May 2019 Mokoena was employed at the Zamdela SAPS Visible Policing and Operations and as the Community Service

Centre Commander. He joined the police in 2011 and had twelve years' experience. He assumed control over the scene from Renken and further secured it.

i) Sello Solomon Thobeha: Thobeha was a Sergeant in 2019 and currently holds the rank of Warrant Officer. In 2019 he was attached to the Zamdela Local Criminal Record Centre (LCRC). He has eighteen years' service in the SAPS. He confirmed that he is a criminalistics expert and that he has been with the LCRC since 2008. He collected the evidence relevant to the case on the scene.

j) Jeanie Eileen Jana van Dyk: Van Dyk is a Warrant Officer stationed at the Forensic Science Laboratory in Pretoria as a reporting officer. She compiled the report in this matter under the Zamdela cas number of 188/5/2019 after the DNA analysis. She confirmed the DNA of the plaintiff on a firearm that was found in the vehicle of which the plaintiff was the driver.

k) Leon de Klerk: De Klerk, having joined the SAPS in 1987, was a Warrant Officer in the SAPS at the time of the incident, but has since resigned. In 2019, he was stationed at the Zamdela Vehicle Crime Investigation Unit. His field of specialization is the inspection of motor vehicles, among others, involved in theft and hijackings. He was also, for many years, a so-called vehicle clearance official that issued vehicle clearance certificates for export or general registration. At the time of his involvement in this case he inspected on average five suspected stolen vehicles per week.

l) Hendrina Johanna Blignaut: She is a Captain in the SAPS based at the Forensic Science Laboratory, Ballistic Section, in Silverton, Pretoria since 1999. Before this, she was with the Guard Unit, Public Policing Unit, Flying Squad and then ballistics. Her extensive expertise and qualifications were admitted by the plaintiff and the documents pertaining to her evidence were admitted into evidence by agreement between the parties.

m) Simon Molefe Monareng: The plaintiff is an adult male born on 29 January 1985. He is a qualified mechanic by trade. He is a man who has had multiple previous clashes with the law, which was his own admission during cross-examination.

The arguments for the plaintiff

[30] The argument for the plaintiff in the heads of argument is primarily based on a lack of reasonable suspicion of danger and the threat of the situation. Some discrepancies in the evidence of the witnesses were also relied upon. It became apparent that the plaintiff also relied on self-inferred probabilities. As such, the incident itself and the opportunity for considered action by the member of the SAPS is questioned.

[31] According to the plaintiff, Renken's evidence disclosed no critical analysis or source of the nature and extent of the information that was available before effecting the arrest. Renken himself was unsure of Menyuka's involvement. The level of implication of Menyuka shows that no reasonable suspicion could have been harboured at the time pertaining to the nature and extent of the crimes in which Menyuka was involved. This renders the incident of the shooting wrongful, illegal and grossly negligent; according to the plaintiff.

[32] No suspicion whatsoever existed in respect of the plaintiff when the operation commenced. The existence of the plaintiff and the presence of the plaintiff in the vehicle were simply unknown. An *ex post facto* determination that the vehicle in question may have suspectedly been stolen or that an unressed firearm was allegedly found in the vehicle makes no difference to the situation

whatsoever. Similarly, the allegations of the plaintiff's previous conviction are also irrelevant. In any event no criminal prosecution of the plaintiff eventuated from the incident.

[33] Based on the totality of the evidence, the plaintiff argues that it is crystal clear that the operation was aimed at securing and arresting the suspects as swiftly as possible, and the intention was to do so through a clear element of surprise as the Special Task Force members were of the impression that the suspects fled the scene of a cash-in-transit heist that day. The whole incident occurred extremely quickly and swiftly. All involved had very limited opportunities to make full observations.

[34] Even if blue lights were used by the police vehicles, the plaintiff's opportunity and time to observe the same was extremely limited, and he was primarily occupied with the Jeep that rapidly cut towards the plaintiff's vehicle. The plaintiff reacted instantly by executing a U-turn in a very short span of time.

[35] The vehicle in question is riddled with more than 28 bullets, many of which penetrated the vehicle at occupant height. Most of the shots came from the right and the back of the vehicle. No shots were fired from the inside of the suspects' vehicle.

[36] Only Masilo allegedly saw a muzzle flash from the suspects' vehicle. However, his contradictions concerning the timing and onset thereof are telling. His credibility is further demolished by his recalcitrance to answer questions, the

argumentative approach to questions and the over-exaggeration of the helicopter playing a role in stopping the suspect vehicle.

[37] It is improbable that the shots, if any, could have been fired from the suspects' vehicle in such rapid succession through an instantly opened left rear window from the moment the Jeep intervened until the U-turn was performed.

[38] The plaintiff maintains that it is likely that the unlicensed firearm was intentionally placed as a distraction. Furthermore, the firearm was not discharged, and forensic testing has conclusively ruled out any adverse implications for the plaintiff in this matter. Additionally, the forensic evidence definitively refutes the claims regarding muzzle flash emanating from the suspect vehicle.

[39] None of the shooters were called to give evidence and a negative inference is warranted.

[40] The fact that the officers immediately asked the plaintiff about the presence of guns and money when they found him next to the vehicle indicates that they were under the mistaken apprehension that the heist occurred that day and therefore clearly intentionally reacted by using force. However, the sheer number of bullet holes and the fact that, forensically they all entered from the outside, confirms that the force was excessive and the members grossly reckless.

[41] The defendant has not proven the jurisdictional facts to show that an arrest was justified or that force was necessary, even more so lethal force. The force was excessive; deadly force was simply not warranted and the officers involved

exceeded all levels of reasonableness amounting to a reckless disregard for the occupants in the suspects' vehicle. The members could have, and should have, resorted to bringing the suspects' vehicle to a stop without the use of force, as they had the means and resources to do so.

[42] The plaintiff reacted within a very short period and his explanation that he perceived it as an attempted hijacking is reasonable, acceptable and logical. *The presence or the absence of blue lights would not have made any difference in the circumstances as the incident occurred in split seconds.* The plaintiff did not realise that he was being accosted by the police and therefore lacked the knowledge, appreciation or consent to a voluntary assumption of a risk associated with his U-turn manoeuvre.

[43] The plaintiff was an honest and open witness who made reasonable concessions also where the same could be seen to his detriment or infringe his character. On the other hand, the defendant has not met their onus of proof, and the plaintiff seeks an order that the defendant is liable towards the plaintiff for damages suffered as a result of injuries sustained during the incident and further that the defendant pays the plaintiff's taxed or agreed High Court party and party costs of suit inclusive of the cost of counsel on scale C.

Arguments for the defendant

[44] The parties agreed that the statements of Mandinda, Da Silva and Ndzwana, officers involved in the operation, were properly commissioned and that it was not improper of IPID to use the witness statements of Da Silva and

Ndzwanana commissioned by Renken. It is accordingly unnecessary to deal with the lengthy cross-examination of Renken on this issue.

[45] The Nongoma docket was made available by the defendant and the cross-examination of Renken on the availability of the docket also does not need to be addressed.

[46] The evidence of Renken cannot be faulted. What is important to note from Renken's evidence is that the Special Task Force members were dealing with a dangerous suspect who was probably armed. Masilo, Motlhoioa and Kabini in their evidence confirmed that the briefing and instructions pertained to a dangerous suspect who was involved in cash in transit robberies. It was not placed in dispute during the cross-examination of Kabini that the Special Task Force members were briefed that the suspect was dangerous, armed and coming from KZN.

[47] The evidence of Masilo, Motlhoioa and Kabini corroborated each other in all material respects, especially pertaining to the briefing, what vehicles were involved, how the vehicles were positioned at the intersection, how the incident transpired, and the boxing-in manoeuvre that was executed. The discrepancy that Masilo testified that the Jeep overtook the suspects' vehicle on the right side, contrary to Motlhoioa and Kabini's evidence that the Jeep overtook the vehicle on the left side, is insignificant and is to be expected from an honest but imperfect recollection of an incident that happened almost six years ago. It further indicates that the witnesses did not tailor their evidence, but that they were credible and reliable witnesses.

[48] Khunou and Maboko supported the evidence of the Special Task Force members that the Airwing participated in the operation and that the light of the helicopter was visible.

[49] It was not placed in dispute during the cross-examination of Masilo, Motlhoioa and Kabini that three Special Task Force vehicles, to wit the BMW, Ford Ranger and Jeep, were present during the incident. The manner and execution of the boxing manoeuvre, presence of the SAPS helicopter and that blue lights and sirens were activated, were also not placed in dispute during cross-examination of Motlhoioa and Kabini. It was not put to Motlhoioa and Kabini during cross-examination that according to the plaintiff, the Jeep came from his left and attempted to cut him off.

[50] The importance of the evidence pertaining to the presence of the SAPS helicopter, the blue lights and sirens of the Special Task Force members' vehicles that were activated is that the plaintiff's version that he thought that it was a hijacking, is improbable and must be rejected as false. What the evidence in fact demonstrates is that a clear attempt was made to arrest and that the plaintiff's vehicle was in fact fleeing from an arrest, not a hijacking. The evidence of the plaintiff that only his motor vehicle and the Jeep was present can simply not be true. What is further evident from the Special Task Force members' evidence is that the boxing-in manoeuvre was used to apprehend the suspect. The Special Task Force members did not start shooting without reason, they returned fire after being shot at in order to protect themselves.

[51] Renken and De Klerk both confirmed that the vehicle's manufacturing tag was tampered with and that the Ford Ranger was stolen. De Klerk's claim about the false number plate is supported by Thobeha's evidence that the plaintiff's prints were on the number plate. The likely scenario is that the plaintiff attached the false plate to the stolen vehicle, rather than simply washing it, as he testified. This bolsters the notion that the plaintiff's vehicle fled from an arrest, not a hijacking.

[52] Thobeha, as with all of the witnesses called by the defendant, was credible and reliable. His evidence was that he swabbed the firearm for touch DNA and not blood. It is clear from Thobeha and Van Dyk's evidence pertaining to swab A6 that the plaintiff's DNA was found on the firearm. However, the plaintiff distanced himself from any contact with the firearm. The fact that only his DNA was found on the firearm points strongly to the fact that only he handled it.

[53] Blignaut's evidence was that most of the shots fired were low shots. This accords with the evidence of the Special Task Force witnesses that they aimed for the tyres, which is corroborated by the fact that three of the four tyres of the Ford Ranger were deflated. In addition, the plaintiff sustained an injury to his left lower leg. This is consistent with the fact that low shots were fired and demonstrates that the Special Task Force members did not shoot to kill. Notably, apart from the plaintiff's injury to his lower leg, the female occupant was uninjured, and the other injuries recorded were minor. Again, this is completely consonant with a finding that the Special Task Force members did not shoot to kill.

[54] It is common cause that the incident happened quickly and that the vehicles drove on uneven terrain. Blignaut and the Special Task Force members testified about the difficulty in shooting in these conditions. This evidence was not challenged.

[55] The number of bullet defects to the Ford Ranger is not an indication of excessive force. It bears emphasis that there were twelve Special Task Force members involved of whom several returned fire. The incident happened quickly which means there could hardly have been any time for them to converse and determine amongst themselves who would shoot. The police officers knew that the suspect was dangerous, was involved in cash-in-transit heists and would most probably be armed. As Kabini testified, the prevailing tenor at the time was 'it's us or them'.

[56] The police were entitled to shoot in the circumstances of this case. They were entitled to protect their lives, the lives of their colleagues and the public at large. Notably, muzzle fire was seen from the suspect Ford Ranger. Kabini and Motlhoioa highlighted the reports about muzzle fire and it is unlikely that this particular aspect would have been mentioned by Masilo if it did not occur. Shots were also heard and upon closer inspection it was discovered that the magazine case on the firearm was not full, which serves as a further indication that the firearm was used.

[57] The Special Task Force members did not know how many passengers were in the vehicle or what weapons they had in their possession. However, they were briefed about the seriousness of the matter and that they were dealing with an

exceptionally dangerous suspect. During the cross-examination of Motlhoioa and Kabini it was not placed in dispute that the Jeep got hit. It is utterly improbable that a member of the Special Task Force would have shot one of their own vehicles.

[58] Taking all of the above into consideration, the force used was reasonable and proportional in the circumstances.

[59] The contradictions between the plaintiff's *viva voce* evidence, his statement, his attorney's letter of demand and the issues not canvassed with witnesses is indicative of the fact that the version that the plaintiff attempted to place before this court is false and stands to be rejected. He was a single witness and his evidence fell significantly short of what was required and cannot be relied upon, save where corroborated. It is not clear why the two other occupants of the vehicle were not called upon and the court is obliged to draw a negative inference therefrom.

[60] For the reasons set forth above, the force used was reasonably necessary and proportional in the circumstances. The plaintiff's claims should accordingly be dismissed, with costs including the costs of two counsel on scale C.

Evidence

1. *Johann Renken (Renken)*

[61] To reiterate, Renken is employed by the SAPS in the Directorate for Priority Crime Investigations and works within the National Priority Violent Crimes Unit in Pietermaritzburg. At the time of his testimony, he had over twenty-nine years of service in the police, including service in the directorate since 2006. He was in this

position during the incident in 2019. His training included basic police training, advanced detective courses, a serious and violent crimes course, and a crimes and terrorism course. These are among the principal courses he has completed.

[62] He testified that, on 16 May 2019, he was on duty together with Captain Ndlela and Warrant Officer Khosa performing investigation duties concerning Nongoma cas 12/2/2019 and Masinga cas 71/7/2018. The offences in the Nongoma matter were for cash-in-transit armed robbery with aggravating circumstances and nine counts of murder. Two murder counts involved police officers, while seven concerned suspects who were fatally wounded in the Nongoma case. There were also two counts of attempted murder of police officials and a count of causing an explosion. The Nongoma incident happened on 1 February 2019. The offences were serious and of a violent nature as high-calibre firearms, along with other types of firearms and explosives, were used by the perpetrators. The perpetrators involved were skilled and effective in the execution of the crimes.

[63] The two police officers who were fatally wounded was a Colonel from crime intelligence and the other a member from the Special Task Force. During the gunfight between the SAPS and the suspects, seven suspects were also fatally wounded and one police officer was shot in the leg while the second police officer was shot in the same vehicle as the other deceased police officers.

[64] On the 16th of May 2019 in the afternoon, Renken received information concerning a suspect who participated in the Nongoma matter. The suspect was heading for Gauteng and, based on the information received, he would be

travelling in a stolen white Ford Ranger. Renken identified the suspect as Siboniso Menyuka, one of the participants in the Nongoma matter. Menyuka was also involved in a case in late January 2019 (also Nongoma) where they bombed a drop safe at a Shell Garage. There was a police vehicle parked close by, a shooting ensued and eight SAPS members were injured.

[65] Renken's colleagues proceeded to the R57 from Heilbron towards Sasolburg, as the information was that they would be using this road *en route* to Gauteng. The Special Task Force was with them; the group commander of the Special Task Force was Captain Masilo, all of whom had been briefed on the information. They were supplied with the name of the individual that they were looking for, being Menyuka, as well as a full description and registration number of the vehicle in which the suspect was travelling.

[66] Renken testified that the Special Task Force was involved because a decision was made after the Nongoma incident that they and the SAPS Airwing will be involved in any operations that would be conducted concerning cash-in-transit cases. The Special Task Force was engaged because of the suspect to be apprehended. He testified that:

‘When I say high profile, dangerous suspects, [I refer to] suspects that deal in extremely violent crimes such as cash-in-transits where high calibre firearms are used, and they have got no regard for the law, so the Special Task Force is trained in those specific operations.’

[67] It is clear from Renken's evidence that Menyuka was regarded by him to fall in the classification of the above. He went on to describe him as: ‘highly

dangerous, violent and fearless.’ He informed the Special Task Force that Menyuka is involved in a notorious gang. All the indications and information pointed to the conclusion that he was armed on that day.

[68] The Airwing’s support was requested and they came out to assist in the tracking and tracing of the vehicle. If the vehicle was stopped and the suspects got away from the vehicle, they could be followed from the helicopter. From this it follows that any vehicle that endeavours to flee, can also be pursued by the helicopter.

[69] The briefing with the Task Force was held at De Hoek Toll Plaza. The indication was that the suspects were travelling on the N3 but before reaching the toll plaza, they diverted and took a different route. The Task Force was informed of this and adjusted their positions towards Sasolburg.

[70] Approximately 21h00 that evening, Renken was informed by Masilo that the vehicle had been spotted and that the vehicle was stopped after a high-speed pursuit. An exchange of gunfire took place and eventually the vehicle was brought to a stop just outside Sasolburg, in a grass field. He was nearby in the vicinity and proceeded to the scene where he spoke to Masilo, who informed him about what had transpired. Renken admitted he omitted the exchange of gunfire discussed with Masilo from his statement.

[71] Renken testified that Masilo informed him that once the vehicle was spotted, they activated their blue lights and sirens resulting in the vehicle speeding away at high speed. They then gave chase resulting in the ensuing gunfight and finally the

immobilised vehicle. He interviewed the occupants of the vehicle, with Ndlela translating from Zulu to English and *vice versa*. The driver identified himself as Simon Monareng and he sustained a gunshot injury to his leg. Siboniso Menyuka identified himself and said he was a passenger in the vehicle while the female identified herself as Nulutandu Xulu.

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[72] Masilo told Renken that while securing the scene, he saw three mobile phones in the vehicle as well as a silver black firearm lying on the passenger floor, which he proceeded to show to Renken as they neared the vehicle.

[73] He also noticed bullet holes in the Ford Ranger as well as three deflated tyres. On close inspection of the vehicle, he noticed that the manufacturing tag in the door had been tampered with and was not positioned as it ordinarily ought to have been. He suspected that the tag had been changed or, at least, tampered with. It was later confirmed that the vehicle was stolen. However, on checking the registration number that was affixed to the vehicle on the computer system, the vehicle had not been reported stolen. The system flagged the vehicle as belonging to one J S Mahamba. The later testimony adduced was that the number plates mounted on the vehicle were false and that the vehicle was indeed stolen.

[74] The firearm in question was a 9mm calibre with an erased serial number, and it was the same firearm as depicted on page 76 of the trial bundle. This was the same firearm that was on the floor of the front passenger seat of the Ford Ranger.

[75] The witness informed Menyuka that he was under arrest for possession of an unlicensed firearm and ammunition as well as for possession of suspected stolen

property, namely the motor vehicle. He then informed Monareng that he was also under arrest on the same charges.

[76] Renken remained by the Ford Ranger so that he could brief people who attended the scene, such as those from the Local Criminal Record Centre, the charge office personnel, and the duty officers. The purpose of him doing so was to ensure that nobody entered the scene or tampered with the exhibits in the vehicle. Sergeant Thobeha from the Local Criminal Record Centre photographed the scene and took possession of the firearm and ammunition found in the Ford Ranger and the vehicle was confiscated for further investigation and examination by the Vehicle Investigation Unit.

[77] Renken testified that Menyuka was a s 204-witness in the Nongoma matter at the time of this trial. During cross-examination it was confirmed that Renken was not present during the chase and the subsequent shootout. He was extensively questioned on the witness statements of the Special Task Force unit members and accused of taking the statements of the Special Task Force members as an attempt to cover his own tracks and protect the Special Task Force members. That was the reason, according to the plaintiff, why the notion of muzzle fire was mentioned in those statements, as it was an attempt to show that the members acted reasonably in the circumstances, when Renken knew they did not. However, Renken disagreed with this.

[78] Renken confirmed under cross-examination that Menyuka and Monareng were arrested for possession of an unlicensed firearm and possession of suspected stolen property. He did not arrest them for attempted murder. In this regard

Renken explained that various dockets were opened concerning the scene, not just possession of an unlicensed firearm and possession of suspected stolen property. It was put to Renken that it was improbable that when he knew he had Menyuka at the scene, that he did not arrest him there and then for the Nongoma docket. Renken responded and testified that they had their target in custody concerning the Nongoma case, but their priority at that stage was the possession of the unlicensed firearm and suspected stolen motor vehicle. He explained that once Menyuka was in their custody, they could question him at their leisure as their time would not have been limited. After the arrest, the investigating officer for the specific case continued with his investigation. Menyuka went with them when they returned to KZN where he was charged and detained, and a s 204-statement taken. Renken could say with some certainty that Menyuka was in custody on the Zamdela matter (the incident in *casu*) for seven days, remanded in custody for seven days and that they then returned to KZN from where he was booked out on investigation on the Nongoma case.

[79] Counsel for the plaintiff put to Renken that he would argue that the best evidence is the Nongoma docket and it was not available, and that Renken had no independent memory of the matter. Renken was asked about the relevance of the Task Force statements in the Nongoma docket and responded that if it was not for the Task Force, they ‘would not have had them’. He testified that he would not have been able to arrest them on the KZN case if it was not for the Task Force stopping them for the Zamdela case.

[80] It was put to Renken that his statement does not say how dangerous the suspects in the Nongoma case were. Renken testified that he did not put in his

statement that the suspect is highly dangerous as it formed part of the briefing; ‘You do not put everything that you have in the briefing in your statement.’ However, Renken agreed that Monareng was not his target. It was put to him that Monareng happened to be in the vehicle by coincidence and he confirmed that his information did not say whether Menyuka travelled with passengers or other people.

[81] Renken explained that IPID ran their own docket; they do separate investigations, interview separate witnesses, make their own findings and, as far as he knew once the investigation was complete, they will then guide them on the attempted murder against the police, whether a charge must follow or not. This docket was entered into evidence by way of a ‘further supplementary bundle’ on 13 September 2024.

[82] Renken disagreed when it was put to him that Masilo never mentioned to him that shots had been fired at them. It was put to Renken that this was the reason why it was omitted from his A1-statement. However, he replied that he omitted to say that shots were fired at them, and it was put to him that he also did not tell Mokoena, as it was not mentioned in his statement. In response, however, Renken replied that he had informed Mokoena.

[83] In cross-examination it was raised that Renken could not produce any objective facts about the outcome of any criminal investigation against Menyuka or his involvement in Nongoma. Some issues were canvassed with Renken in re-examination; I will not repeat it.

Evaluation

[84] The witness was a very good witness. He testified in a manner that corroborated his extensive experience in the SAPS and did not, in any way, endeavoured to cover for or replicate the evidence of his colleagues. He was honest when he forgot something or could not recall all the details of the event. Given the complexity and comprehensiveness of the investigations, he gave a trustworthy and solid depiction of his involvement in the case. He did not give the impression that he was solely intent on convicting the accused or to protect his colleagues from possible repercussions.

[85] The criticism by the plaintiff that he wanted to cover himself, his colleagues, and the SAPS for the shooting of the plaintiff is unfounded. His evidence is supported by several objective, solid facts, such as the firearm that was found in the Ford Ranger, that the Ford Ranger was proven beyond any doubt to have been stolen and that the accused was involved in a robbery. In addition, the DNA of the plaintiff was found on the firearm that was confirmed to be an unregistered firearm which had been tampered with in order to subvert its origins. Furthermore, Menyuka was confirmed to be a very dangerous suspect that was part of a sophisticated criminal gang of violent cash-in-transit robbers.

[86] It is impossible that, upon arriving at the scene, Renken was not informed or remained unaware that a shooting had taken place. If this had in fact been the case, then he could, at the very least, have observed it for himself by viewing the bullet-riddled state of the vehicle. Crucially, there cannot be any doubt that the Special Task Force was fully appraised of the seriousness of the operation after they were briefed with facts that were later proven to be real and true. In fact, the evidence

tendered was so substantial that various crime prevention units were used in the operation; namely the Special Task Force, the Airwing and provision was even made for an ambulance to remain on standby. In addition, other police units were cautioned to position themselves away from the suspected contact point with the vehicle and its occupants because of the possibility and severity of the danger posed.

[87] Malicious collaboration between the witnesses that muzzle fire was observed is negated by the fact that only Masilo saw it. They heard that Masilo asked who had been shooting but could not see any muzzle flashes. This shows the veracity of the evidence of the members that were involved and the reports that were made to Renken.

2. *Keith Austin Wessels (Wessels)*

Introduction

[88] The evidence of the witness turns on the so-called Menyuka 204-statement. It is vital that, before I depict the evidence of Wessels, the admissibility thereof is dealt with.

[89] The evidence was objected to by the plaintiff and admitted provisionally and on the premise that Menyuka will testify to confirm the correctness and authenticity of the statement. The plaintiff did not call Menyuka nor Xulu to confirm his version of what transpired in the Ford Ranger which he was driving that evening. Menyuka did not testify for the defendant and the option that follows is to allow it on the exceptions in terms of the Law of Evidence Amendment Act 45 of 1988.

[90] It is trite that this Act regulates hearsay evidence in criminal and civil cases. Hearsay evidence, reliant on someone other than the testifying witness, is usually inadmissible unless all parties consent to its admission, the original source of the statement testifies in court and the court deems it in the interests of justice to allow the hearsay, considering factors such as the nature of the evidence, reasons for not calling the original witness, and any potential prejudice.²³ Examples include a witness recounting what another person said about an event or submitting a written statement from someone not having given evidence in court.

[91] The Constitutional Court's decision in *Kapa v S*²⁴ requires courts to consider all relevant circumstances before admitting hearsay, especially in criminal matters. The evidence presented will show that the purpose of the reference to the statement in this case is relevant. It is relevant, according to the defendant, to show that the police were justified in the operation and the manner in which it was executed due to the danger that Menyuka posed as result of his involvement in serious crimes.

[92] In *Biyela v Minister of Police*²⁵ (*Biyela*) it was ruled that:

‘[32] It is common cause, in this matter, that the arrest was effected by a peace officer. It is further common cause that the appellant was allegedly suspected of having committed a Schedule 1 offence. *The only controversies in this matter are whether the arresting officers could*

²³ Section 3 of the Law of Evidence Amendment Act 45 of 1988.

²⁴ *Kapa v S* (CCT 292/21) [2023] ZACC 1; 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) (24 January 2023).

²⁵ *Biyela v Minister of Police* (1017/2020) [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) (1 April 2022).

have formed a reasonable suspicion based on hearsay evidence and the credibility of the arresting officers.

[33] The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)(b) is objectively justiciable. *It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.* (Accentuation added.)

[93] The existence of the statement and the contents thereof is a proven reality, given the evidence of Wessels. Whether the evidence therein is the truth or not goes to the weight of the evidence; the fact of the matter is that the 204-statement confirms that Menyuka, as part of a cash-in-transit gang, was involved in the crimes upon which the information was based which ultimately culminated in the event on 16 May 2019. Based on the evidence presented, the plaintiff does not appear to dispute that Menyuka has a reputation for involvement in serious offences. As ruled in *Biyela: the evidence that caused the arrest does not have to be admissible in the subsequent trial*. As such, the existence and the content of the evidence are ruled admissible for the purpose it is adduced.

The evidence of Wessels

[94] Wessels is a Lieutenant Colonel in the police stationed at the Umgungundlovu District Office in KZN. Previously, he was stationed at the Pietermaritzburg Detectives and prior to that he was at the Alexandra Road Detective Services, also as a Lieutenant Colonel. He has thirty-nine years' experience in the SAPS.

[95] Wessels was referred to the statement dated 28 May 2019 at page 324 of the trial bundle. He testified that he was requested to obtain the 204-statement from a person and was only given the person's name when they arrived at his office, namely one Siboniso Menyuka. Wessels interviewed Menyuka who informed him that he had come to give a statement with regard to an incident that apparently happened in the Nongoma area in KZN. Wessels explained Menyuka's constitutional rights as well as the implications of a s 204-statement.

[96] Before taking the statement, Wessels was unaware of the two incidents that Menyuka reported to him. To this end, he provided an explanation pertaining to the manner in which the statement was recorded. Menyuka was satisfied with the contents; there were no errors in the typed document which Wessels checked against the written version. The document is dated 28 May 2019 and contained the initials of Menyuka. The content was read out to Menyuka and interpreted from English to Zulu and *vice versa* by one Ndlela. Menyuka confirmed that he understood everything and proceeded to append his signature to the statement.

[97] During cross-examination, Wessels stated that he was not involved in the Nongoma investigation. Also, Menyuka did not inform Wessels whether he had been to court or not. Wessels simply recorded what Menyuka told him. It was put to Wessels that it would be argued that when Menyuka was arrested in Sasolburg, he had not stood trial in the Nongoma case. Of this, Wessels had no knowledge.

Evaluation

[98] The evidence provided by the witness is accepted as accurate. Wessels is regarded as a credible witness, and no concerns regarding his trustworthiness or good faith were identified.

3. *Tebalo Jonas Masilo (Masilo)*

[99] Masilo is a Captain in the SAPS based at the Special Task Force in Pretoria. He is a veteran policeman with twenty-three years' experience. He has an impressive twenty-one years' experience in the Special Task Force. Prior to, and during his service with this unit, he received comprehensive paramilitary training encompassing both theoretical instruction and practical experience in law enforcement as a police officer.

[100] The duties of the members of the Special Task Force are hostage release, counter-assaulting, VIP protection, cash-in-transit robberies, high-risk duties and high-risk warrants. A high-risk warrant entailed the 'following up' to arrest any suspect.

[101] On the day of the shooting, he was the section commander of the Special Task Force team performing their official duties. He received a call to assist the Directorate Priority Crime Investigation (DPCI) unit who were tracking a vehicle. The suspect was driving a white vehicle and was wanted in relation to the Nongoma case with cas number 12/2/2019. After receiving the call, they went to De Hoek Tollgate Plaza, Heidelberg, where they met Renken who briefed them that the suspect was driving a white Ford Ranger. Renken informed them that the suspects were driving from Durban in the direction of Johannesburg.

[102] Renken told them that the suspects were dangerous. Specifically, they were wanted with regards to a cash-in-transit case where two police officers lost their lives, one of whom having been a member of the Special Task Force. The other was a member of the DPCI. Renken further informed them that, based on the evidence provided, the suspect was possibly armed as they usually carry firearms. While they were waiting at De Hoek Plaza, they were told to divert from Heidelberg to the R57 which runs northbound from Heilbron to Sasolburg.

[103] He provided the names of the members of the Task Force who were in attendance and all were in full uniform. They used three vehicles, namely a white BMW 140, a grey Jeep and a white Ford Ranger. The SAPS' helicopter from Johannesburg Airwing was also present. It was clearly marked and had a large spotlight. The helicopter was noisy and could not be missed.

[104] Masilo was the front passenger in the BMW and Warrant Officer Kabini was the driver. Warrant Officer Nunu was seated in the rear, behind Masilo. He testified that the BMW and the grey Jeep were situated on the northern side of the R82 towards Sasolburg on the left-hand side while the Ford Ranger was positioned on the R82 on the western side of the R57, close to where the roads intersect. The Airwing helicopter was also on the western side, having landed somewhere in the area. The BMW was approximately 200 metres from the intersection, the Jeep 300 metres and the Ford Ranger 100 metres.

[105] The Jeep, BMW and Ford Ranger were not marked as police vehicles but activated their blue lights and sirens once they started driving. They used unmarked vehicles because they worked under cover most of the time and were

tracing terrorists and/or counter-terrorists or members in cash-in-transit crimes. He explained why the Special task Force used those vehicles on the day.

[106] The DPCI took up position far from the junction, the reason being that they were working with dangerous suspects and wanted to prevent any cross-firing in the event of a shootout. The Special Task Force members made sure that the DPCI or any other members were far away until the suspects had been apprehended whereafter the DPCI was called to the scene. As mentioned earlier, an ambulance was on standby nearby.

[107] He testified that communication between the vehicles concerned, as well as the helicopter, was done over a police radio. As soon as he saw the suspect Ford Ranger he communicated on the radio, and all concerned were given the order to move out. Once they did, the sirens and blue lights were activated. Masilo again emphasised the lights and markings on the helicopter.

[108] When the suspect vehicle was identified, the chase commenced: the Jeep was the first vehicle, followed by the BMW of which he was a passenger with the white Ford Ranger close behind. As they neared the vehicle, they noticed the specific registration number that was disclosed during the briefing. The Jeep proceeded to overtake the suspects by moving to the right side of the road.

[109] The windows of the police vehicles were purposefully opened. There are several reasons for this, namely that they could be identified as members of the SAPS (through their uniforms) and, of course, 'that we are waving to stop or to say

something'. Further, their sight must be clear and they must be able to hear what happens.

[110] As the Jeep passed the suspect Ford Ranger he heard a loud noise, which worried him as the commanding officer. He enquired over the radio whether anyone was shooting, because the loud noise sounded like gunshots. In the meantime, the Jeep passed the suspect Ford Ranger. However, the Ford Ranger also moved to the right, inserting itself between the Jeep and the BMW. Before Masilo could proceed close to the left-hand side of the suspect Ford Ranger, he saw a muzzle flash.

[111] He testified that when the Jeep was in front and the BMW behind, the suspect Ford Ranger moved to the right, in other words getting out between the BMW and the Jeep. He testified that the muzzle flash emanated from the left-hand side in the direction of the BMW, but as the suspect's Ford Ranger made a very sharp turn, turning back from where it was coming, a stun grenade was thrown by an occupant of the Special Task Force's Ford Ranger. Masilo testified that the suspect Ford Ranger was going back south over the island between the north- and south-bound lanes. At that stage, he saw muzzle flashes from the right-hand side, from the suspect Ford Ranger directly in their direction (the BMW). It came from the driver's side.

[112] He testified that the BMW was a vehicle built 'very low on the ground' and they could not drive over the island. Warrant Officer Da Silva proceeded to fire shots in the direction of the muzzle flashes. Because they could not drive over the very uneven island between the lanes, they stopped and alighted. He testified:

‘We went out. I went out. Da Silva, I know he went out. I cannot remember whether, because now this, everything is happening a split second. It is very, it is very, it is something that you cannot say you know, you see this one moving or that, but you can see the main things that you have to be sure of, especially arresting. That is the main thing we are looking at.’

The impetus of his evidence is that they are trained and focused on arrest and not harm. They must protect their own lives and the safety of their colleagues, but they are trained to do this as carefully as they can, while causing minimum harm.

[113] The suspect Ford Ranger moved slower, it lost momentum and direction. During all this, his sight was good because they were assisted by the spotlight of the helicopter. He ran to the suspect Ford Ranger and shouted ‘police, police!’ The passenger side of the vehicle was open. They got the situation under control, as he put it. There were three people in the vehicle. A lady in the back, one was on the grass and the other was sitting in the front passenger seat.

[114] He called for Renken and his people and that is when he noticed the weapon and the cell phones. He could clearly see that the weapon was ‘like scrapped, scratched or scrapped where it is supposed to have maybe numbers or names on it.’ They are not allowed to touch anything. The scene was cordoned off by his members and handed over to the DPCI. One of the suspects was in the care of ER24 before any other ambulances could arrive. He testified with reference to his statement (trial bundle on pp 220-223) that he had told Renken what happened and Renken recorded it as he was giving his version. He explained to Renken, when he arrived on the scene, that there had been a shootout.

[115] Furthermore, the version of the plaintiff that he was shot at by the people in the Jeep and that he then made a U-turn to try and get help from the police back in the road was vehemently denied by the Captain. It is his observation and testimony that they were trying to escape. He emphasised that *the suspects shot first*. There were blue lights and sirens from each of the three Task Force vehicles as well as the helicopter.

[116] Masilo described the muzzle flash as a flame. The stun grenade made a loud noise when it went off. *He also explained how they tried to immobilise the suspect Ford Ranger. They first tried to block it but they could not do so. Then the shots were fired, then the police shot at the wheels of the vehicle. They also shoot at the engine to try an immobilise the vehicle.* Furthermore, he testified with the confidence of his training and experience that the force that the Task Force used was appropriate and fitting in the circumstances. He testified that to the north, in the direction of Sasolburg there are built-up areas and to the south, towards Koppies following the R82, on both the left and the right sides of the road, the area is occupied with numerous shacks. *They were obliged to shoot the vehicle in order to demobilise the vehicle as the situation was getting dangerous, not only for them, but the general public as well.*

[117] Masilo testified that the members of the Special Task Force had taken reasonable measures in the circumstances. From his evidence it is clear that they could have shot and killed all the occupants in the vehicle. However, they only wounded the plaintiff in his leg. Furthermore, *during the debriefing they observed*

two bullet holes in the Jeep's windshield, on the left-hand side. The other two cars did not appear to have sustained any damage.

[118] The cross-examination of Masilo was extensive and intense at times. *Important from the cross-examination is that he was of the opinion that the amount of shots that were fired being, were by his estimation around 26 or 27, which he contends is not much given the amount of members that were present, and these shots were fired as they were being shot at.* The suspect shot towards his direction as well as the other members which compelled them to use force. He explained by implication that there were twelve members and it can easily come to the amount of shots indicated by the expert. It does not amount to excessive force.

[119] Masilo was questioned about the muzzle fire that he saw from the driver's side of the suspect Ford Ranger as the vehicle started to turn. He reiterated that things happened in 'a split of a second'. He testified that 'as he turned there goes the stun grenade. Then there was a muzzle flash. Then that is Da Silva shooting.' He also testified about the triangle with the suspect Ford Ranger in the right lane, the Jeep ahead of it followed by the BMW. *He maintained that he saw muzzle flashes from the left- and the right-hand sides of the suspect Ford Ranger.*

Evaluation

[120] Captain Masilo demonstrated exemplary conduct as a witness. He presented his testimony accurately and without embellishment, conveying information clearly and objectively. Despite undergoing extensive and rigorous cross-examination, he remained composed and consistent throughout. He became slightly agitated with counsel for the plaintiff when he tried to explain over and

over that they could not have allowed the conduct of the people in the suspect vehicle. They acted lawfully to protect their own lives and to apprehend the suspects; they were not out to kill them. No one, including any of the Task Force members, were killed, and only one of the passengers was injured. According to him the result was as good as it could get under the circumstances. His evidence was similarly corroborated by indisputable objective facts that were proven beyond any doubt in later evidence. The police Jeep was hit by firearm shots. There was a firearm in the suspect vehicle. The magazine was not full. The suggestion that they planted the firearm is, frankly, preposterous and desperate by the plaintiff. It does not tally with the circumstances that prevailed. The question remains as to how the DNA of the plaintiff came to be on the firearm if they 'planted' it.

[121] He is a highly trained and experienced officer that performed his duties in very specific circumstances; his observation was keen and focused. He heard a sound that sounded like gunfire and first ascertained whether anyone was shooting. He maintains that he observed muzzle fire from the suspect vehicle, something which his team did not claim to see. This negates the notion that they were colluding with their commanding officer. Furthermore, the evidence is, unequivocally, that all the shots were fired at a very low angle into the suspect vehicle and that he did not have any choice but to allow the shooting in order to protect the public, other police members and the members of his own team. Three tyres were 'shot out' and the other shots were mainly low on the vehicle. The other two occupants were not injured. The plaintiff was hit on his lower leg. They were clearly not aiming to kill. They were extensively briefed on what to expect and the information was later proven to be correct.

4. *Meshack Motlhoioa (Motlhoioa)*

[122] He has been in the SAPS since 2003 and thus for twenty-one years of which fourteen years is in the Special Task Force. He further introduced himself to the Court by informing that he suffers from dissociative amnesia, which is a condition brought on by an extremely traumatic event. He had been involved in a shooting incident where he almost lost his leg. As a result, his memory is severely affected. He indicated that he came to court to assist the Court as best as he could.

[123] He remembers that Captain Masilo was in charge of their Special Task Force Unit on 16 May 2019 and was the one who conducted the briefing in Pretoria. The briefing informed the members that a very dangerous, wanted suspect had been involved in a cash-in-transit heist in Nongoma and would be making his way from KZN to Gauteng.

[124] The description of the suspect vehicle provided during the briefing was that the suspect was driving a white Ford Ranger. Captain Masilo, as commander of the Task Force, decided which vehicles were going to be used, namely a Jeep SUV which was greenish in colour, a white 1-series BMW and a white Ford Ranger bakkie. Twelve members, including Masilo were assigned to the vehicles. They used three vehicles because this wanted suspect was travelling with a vehicle as well and they wanted to execute a boxed-in manoeuvre which would have been the most efficient way of bringing the suspect to a standstill. He explained that the box-in manoeuvre is where there are three vehicles following the suspect vehicle. They would wait for the right opportunity and when the vehicle is clearly visible to them, the member in charge by means of radio communication will identify the vehicle. The first vehicle would push to get past the suspect vehicle. If this is the

suspect's vehicle, the vehicle in front would move in front of the suspect vehicle with the other two vehicles following directly behind. The vehicle that followed the first would manoeuvre itself alongside the suspect vehicle while the third vehicle, following the second, would position itself behind the suspect vehicle.

[125] Masilo assigned the drivers and the crew members to the vehicles. Motlhoioa was assigned as the driver of the Jeep and Captain Fanampi sat next to him. The other persons in the Jeep were Warrant Officer Ngcangashe and Warrant Officer Ndzwanana. Ndzwanana was seated behind him and Ngcangashe was seated behind Fanampi. Warrant Officer Kabini was the driver of the BMW with Masilo seated in the front next to him. Warrant Officers Sotheni and Madinda were assigned the Ford Ranger together with the late Warrant Officer Tolbadi.

[126] They left the office and travelled on the N3 because they were informed that the wanted suspect was going to travel *via* the N3. They stopped close to the toll plaza as Masilo wanted to speak to the team to keep them abreast of what was required of them from that point onwards. Not long after sunset, Masilo briefed the team that new information was obtained indicating that the suspect was no longer traveling on the N3 as expected. Rather, they were taking a different route that led to Sasolburg. However, he could not recall the road. They took the route towards Sasolburg which is how they ended up stationed and positioned in a completely new area.

[127] *They positioned the vehicles at a four-way intersection. The Airwing helicopter also formed part of the operation and he could hear the helicopter flying overhead and could see the spotlight lighting areas as it moved. The Jeep*

did not have a siren nor was it fitted with blue lights on the roof, but it had blue lights on the dashboard which were activated once the chase commenced. The BMW, on the other hand, was fitted with a siren which he could hear when it was activated. All three vehicles were unmarked. While they were stationary at the intersection, Masilo contacted them on the radio and indicated that the vehicle was on its way. Masilo described the vehicle as the white Ford Ranger and provided the registration number, but he could not recall it during his testimony.

[128] The witness's responsibility was to focus on the driving. The vehicle fitting Masilo's description passed him and Masilo immediately confirmed that this was the vehicle sought. The Jeep was the lead car, and as the driver, Motlhoioa confirmed that it was the Ford Ranger in question – it was the only vehicle on the road at the time. When the suspect's vehicle passed him, it was in the lane closest to the centre island.

[129] The suspect's vehicle was already in front of him when he moved in on the road and *he saw the lights of the other vehicles coming from behind*. When the three vehicles of the task force were now all behind each other, Masilo gave the go-ahead by saying 'this is a "go".' He testified that he pushed with the Jeep to pass the suspect's vehicle and swerved in front of the vehicle and immediately hit the brakes, thereby forcing the suspects to reduce their speed. Simultaneously, the other two vehicles positioned themselves in order to perform the box-in manoeuvre .

[130] He further testified that as it was nighttime and that the blue lights in each of the vehicle were activated as soon as Masilo gave the 'go' command. However,

once the suspects got wind of the situation, the driver suddenly turned towards the open island in the middle of the lanes.

[131] The suspect decided not to bring his vehicle to a standstill but opted to make a run for it, because he swerved onto the open island with the clear intention of evading the police. The suspects drove on the island for a bit and proceeded into the lanes of the oncoming traffic. At this point, things were happening very fast. It must be noted that, despite the dark, he could clearly make out what was happening as the helicopter had provided the required light. Lastly, he testified that usually during operations, the driver's window remains closed because he was not going to engage in anything. The other windows are supposed to be open.

[132] He testified that he normally uses a R1 rifle but did not use the firearm on the night in question, as he was the driver. Fanampi had an R5 rifle while Ngcangashe and Ndzwanana had R1 rifles; the calibres of these rifles differ. Motlhoioa heard other members say they saw a muzzle flash but he did not see it. A muzzle flash happens in a matter of seconds, and he was focused on driving the vehicle. He managed to turn his vehicle while Ngcangashe discharged some shots. He stopped the vehicle because, as he testified, it was nighttime and there was gunfire involved. Ultimately, had the suspect complied by stopping his vehicle he would have just been apprehended.

[133] *It was clear that their vehicle had been hit as the window was broken by a gunshot which hit the vehicle close to where Fanampi was sitting in the front, on the corner where the door closes. He explained that it was by the windscreen side where it makes a bend. This was on the post. Also, the window which Fanampi had*

not opened, broke. He could not say where the shot came from but testified that his members could not hit his vehicle or shoot at it. Ngcangashe was seated behind Fanampi on the left. The centre island was uneven and Motlhoioa demonstrated how the rifle would shake if one handled the rifle in a car. He denied that the first shots that he heard on the evening came from Ngcangashe. Rather, he testified that the first sounds he heard in this regard were while he was in the process of making the turn and it was either gunfire or a stun grenade, but it did not come from Ngcangashe. When Ngcangashe returned fired from the Jeep, the Jeep was already on the island, pursuing the suspects. Motlhoioa managed to bring the Jeep to a standstill on the island. He remained in the vehicle, but his passengers alighted.

[134] Everything happened very quickly. Motlhoioa agreed that, to a certain extent, there was a limited time to make observations. However, it would have been impossible for the occupants of the suspect's vehicle not to see the blue lights. It was his view that the suspect's vehicle ultimately came to a standstill because of the gunfire; the tyres were shot out which immobilised the vehicle.

[135] *It was put to the witness in cross-examination that it was not impossible that the damage to his vehicle was inflicted by a members' bullet to which he responded that it was not from the member on the left-hand side. Given the position and the damage that was inflicted on his vehicle there was no way that the member sitting at the back squeezing off shots could have inflicted that.* After the members in his vehicle alighted, he did not hear any further shots.

[136] It was put to Motlhoioa that when Masilo testified, his evidence was that the Jeep overtook the suspect on the right and not on the left. Motlhoioa replied that it

was on the left-hand side, not the right. The witness was asked whether he wrote a damage report for the Jeep. He replied that the report was made in the occurrence book. He did not look at the entry to refresh his memory. It was put to Motlhoioa that he had read Masilo's statement. He responded that he had not done so.

[137] *Only 4 of the 12 members of the Special Task Force deployed on the night of 16 May 2019 were still in the police service, namely himself, Kabini, Masilo and Fanampi. Tolbadi had passed away.*

Evaluation

[138] This witness was an almost naively honest witness. He realised that his memory was affected and was careful not to supply the Court with incorrect information. I will regard his evidence with caution. The contradictions with the evidence of Masilo is understandable, in light of the circumstances, and is a clear indication that the Task Force members did not collude in any way.

5. Aaron Simon Kabini (Kabini)

[139] He has been employed in the SAPS for twenty-one years and was stationed as a member of the Special Task Force in Pretoria. His evidence was that Masilo was in charge of the operation and summoned twelve members to participate in the operation on 16 May 2019. The members were called to the office in Pretoria where they were on the operation and that they were dealing with a high-risk suspect traveling from KZN towards Gauteng. They were going to intercept the suspect *en route*.

[140] His testimony corresponded with that of other witnesses: all three vehicles were unmarked, namely a white BMW 1 Series (which he drove with Masilo as instructed), a white Ford Ranger, and a greyish Jeep. Warrant Officers Nunu and Da Silva were in the BMW, in the rear seats while Masilo sat next to him in the passenger seat. Motlhoioa was the driver of the Jeep and the occupants were Fanampi, Ngcangashe and Ndzwanana. The driver of the Ford Ranger was Warrant Officer Sotheni and the other occupants were Warrant Officers Phala, Tolbadi and Mandinda. *Tolbadi has since passed away and of the twelve members involved in the operation on 16 May 2019, only four were still in the Special Task Force, namely, himself, Masilo, Motlhoioa and Fanampi.*

[141] He testified that, after the briefing in Pretoria, they moved to the N3 and took up position close to the De Hoek toll plaza as the suspected car was expected to be coming from KZN *via* N3. It would have been a good location to apprehend the suspects.

[142] Masilo was talking to Renken on the phone and relayed the messages through the radio to the other vehicles so everyone could remain abreast of developments. He confirmed that the communication was to the other two vehicles and the helicopter. Information was received that the suspect had diverted his course and was taking another route from Villiers towards the road that goes to Sasolburg on the Free State side. This required the Task Force to relocate its positions from the N3. They took up positions at an intersection between the R57 and R82 as information was received that the suspect was using the R57 that goes to Sasolburg. The intersection appeared to be an ideal location to position themselves.

[143] Masilo posted their vehicles: the BMW was posted off the road on the far side of the intersection, on the left-hand side of the R57. He positioned the vehicle in such a manner that the vehicle faced the road, in order to see which cars were traveling to and from either direction, also, this position offered maximum range of vision. The Jeep was on the R57 facing Sasolburg while the Ford Ranger was on the R82. The Ford Ranger was then there mainly to apprehend the suspects, but it also served a secondary function by being posted on the R82, which was to serve as a contingency, should the suspect alter his course at the intersection.

[144] Masilo coordinated communications between the ground vehicles and the Airwing. He informed all parties that the vehicle was approaching and advised the Airwing to initiate start-up procedures and prepare for take-off, ensuring synchronized arrival should the vehicle reach the location.

[145] After a few minutes, Kabini saw lights approaching. As the suspect vehicle approached, he could see it was a white Ford Ranger. As it came closer, he could clearly see this was the car that they were looking for. Masilo gave the go-ahead to proceed with the box-in manoeuvre.

[146] The suspect vehicle was travelling along the R57, on the inner lane next to the island, namely the right lane. He explained the manoeuvre in the same manner as the other witnesses and also added that their car was fitted with blue lights and sirens which were activated as soon as they pulled onto the road, thereby indicating their status as law enforcement. The other two vehicles, the Jeep and the Ford Ranger, had dashboard blue lights which were glaringly obvious and visible

as it was nighttime. He indicated that the purpose of the sirens and the blue lights was to make the suspects aware that they were law enforcement officers intent on stopping and apprehending the suspect. He testified that once the Jeep moved past, he followed and noticed how the Jeep performed the first part of the box-in manoeuvre by passing the suspect's vehicle.

[147] *Some shots went off when the Jeep was in front of the suspect's vehicle and then in the split of a second the suspect vehicle made a quick U-turn.* He was questioned as to where the Jeep was when the shots went off and answered that the Jeep was in front of the suspect. He was also questioned as to the origin of the shots. He was unsure where it was coming from because he heard shots going and then, in 'the split of a second' after the shots went off, the suspect vehicle swerved onto the island towards the oncoming road.

[148] When the suspect vehicle swerved from the road, the Jeep attempted to do the same but could not as the car is built lower to the ground than a Ford Ranger and could possibly not navigate the island properly. The suspect vehicle moved from the island and came to a stop on the other side of the road. Throughout, Kabini could hear the helicopter above them and could perceive the light provided overhead.

[149] He did not shoot on the night in question nor could he see Masilo shooting while he was in the car. He was also unable to say whether Da Silva and Nunu shot while they were inside the car and he maintained this position as he would have been able to hear gunfire, had any of the passengers been shooting. However, he did not know whether they fired shots after they alighted and accosted the suspect.

[150] Had the suspect vehicle stopped, they simply would have arrested them and the vehicle would have been searched and taken to the police station, or detectives would have been called to the scene. Kabini did not anticipate the suspect vehicle swerving from the road to the right because there were blue lights and sirens, and it was very clear that the pursuers were law enforcement officers. Furthermore, the police helicopter was marked and provided required illumination on the ground.

[151] He was asked whether there were other vehicles parked in the vicinity of the intersection and replied that he noticed a steady glowing blue light rather than rotating. He thought that it was police doing other work. Furthermore, he noticed that the Jeep was damaged.

[152] During cross-examination, he stated that the entire incident – from the moment the vehicles took off to the moment both vehicles stopping – occurred rapidly. Once he drew alongside the suspect vehicle, he kept his eyes on the road and the vehicle was in his peripheral vision. He did not turn his head to look at it. He denied that he had a proper visual of the suspect motor vehicle. On his peripheral vision he could not see muzzle flashes, but he could hear shots being fired.

[153] Kabini testified that people involved in cash-in-transit heists are dangerous and that when dealing with them ‘it’s them or you if something happens’. He did get the impression that they were being shot at, but he did not see it because, as mentioned, he was preoccupied with driving. He could, however, recall that Masilo, at some stage, said ‘shots fired’. Furthermore, Kabini was of the opinion

that it was the shooting which caused the vehicle to come to an eventual stop as the wheels were blown out.

Evaluation

[154] Kabini was a good witness that merely gave his version of what he experienced. It corroborated the evidence of his colleagues from his perspective of the events.

6. Renata Rosie Khunou (Khunou)

[155] She is a Lieutenant Colonel stationed at the SAPS Airwing in Bloemfontein. She qualified in 2012 and has been attached to the SAPS Airwing since 1 May 2014. On 16 May 2019 she was stationed at the SAPS Airwing in Johannesburg.

[156] She was referred to page 387 of the trial bundle, to a document headed ‘request for support – helicopter fixed wing’ dated 16 May 2019. She confirmed that the SAP 486 is a requisition form that is used by other units requesting support from the Airwing for operations or any other tasks that they might have. The request came from the Special Task Force unit.

[157] Maboko was the crew member and is also known as an air law enforcement officer (the ALEO). Khunou was the pilot on 16 May 2019 and he was on board with her in the helicopter. She explained with reference to the flight log that they left the Rand Airport at 19h05. She was asked why they had to go to Sasolburg to which she responded that air support was to assist the Special Task Force as they would be conducting the operation and that the helicopter’s spotlight was required. They had to approach the area only when the Special Task Force asked them to

come to the spot of the operation. The spotlight is located at the bottom on the outside of the helicopter and is controlled from inside by Maboko. The purpose of the light was to give visual assistance to officers on the ground, particularly at night and to direct the light to specific areas where the Special Task Force would require assistance.

[158] They left Vereeniging at 20h30 and arrived at Sasolburg at 21h00. They landed and did a shutdown in Sasolburg close to where the operation was. Once they identified where the Special Task Force was, they established communication with them.

[159] They took off at 21h20 because they received a call that the suspect was approaching the location and that their assistance with the spotlight would be required. Maboko was given instructions as to the areas that required light while Khunou's instructions were to orbit around the site of the operation and the vehicle. She testified that, operationally, they do not fly on top of the vehicles. They orbit around so that they are able to provide a '360 degrees' perspective of the area where the Special Task Force required support with the light.

[160] *They took off and they were overhead for just about a minute and were just over the operational area when they were told the suspect was identified. It was a double-cab or a van, and they had the vehicle that was being chased in their sights because it did not stop when ordered to do so; they were circling around that vehicle.* She could not recall the exact height at which they flew but it was above the high-tension electrical wires. As regards the power of the tracker light, it amounted to an equivalent of 20 million candle lights.

[161] She could not recall how long they were flying above the scene but stated that she took off at 21h20 and landed back at Randburg at 22h05. Between that time, she flew overhead and was able to see the Special Task Force members because those were the first people they identified prior to landing at Sasolburg, just as a positive identification that these were in fact the officers they were coming to assist. Maboko was able to see them while they were flying.

[162] During cross-examination it was put to her that she did not have a visual of the vehicles, it was her ALEO who had the visual of what was transpiring on the ground. She answered affirmatively. It was put to her that one would expect somebody to hear the noise of the helicopter and to see the light. She agreed. *She testified that the vehicles were definitely moving, as they were chasing the vehicle while they were orbiting around. The vehicles were by no means stationary. She testified that what she could recall was that they took off, approached the operation and orbited in the direction in which the vehicle was being chased. She recalls the chase by the Special Task Force and that they orbited in the direction where the vehicle was being chased until it came to a stop. Naturally, one would be expected to hear and see the helicopter from the ground.*

Evaluation

[163] This witness was an excellent witness. She is clearly well trained and diligent in her duties. Her evidence cannot be faulted, and it clashes with the evidence of the plaintiff that he did not see or hear the helicopter.

7. Remember Maboko (Maboko)

[164] Sergeant Maboko joined the police in 2009 and has been a member of the Airwing since 2014, which is a special unit in the SAPS, specifically involved with air support for police on the ground. He indicated that he has been involved in many operations since he joined the Airwing Unit. As he put it; ‘. . . you know in Johannesburg, Gauteng, it is one of the busiest areas in the country. So, we do a lot of operations. Night and day.’ Because the unit performs so many operations, he did not have a good recollection of the events and was, accordingly, not very helpful to the Court.

[165] He confirmed that on 16 May 2019 he was part of an operation. During cross-examination he admitted that he did not have an independent recollection of the operation of that day. He has been involved in numerous operations and in this instance, in 2024, provided testimony of an operation that transpired in 2019. He ‘used his mind’ to refresh his memory as best as he could. He recalled that a request letter received from the operations room requested a helicopter for an operation where a suspect’s vehicle was driving from KZN to Gauteng *via* Sasolburg.

[166] He testified that they mobilized a helicopter, took off and landed near Sasolburg around 21h00. They were given an instruction to fly slowly towards the operation site; they had coordinates on the GPS that directed them. He could specifically recall that the vehicles were stationery and the blue lights were on.

[167] Khunou was the pilot and he the co-pilot. His task was to also operate the light or, as he called it, the ‘tracker beam’ or ‘night sun’. It is a special light to give support to the ground crew at night when it is dark and, in order for him to operate

the light, they must tell him where to direct it. He will be listening and do as instructed. He recalls that there were very high Eskom electricity pylons which forced them to compensate their height in order to safely navigate the helicopter.

[168] He confirmed that he was given instructions as to where he must direct the light, and he was, naturally, able to see what he was lighting up. He could see vehicles on the ground. The light of the helicopter was switched on before they came to the scene. He testified that he could see stationary vehicles with blue lights on the ground when they flew overhead. It was not easy for him to count how many vehicles were involved because he concentrated on directing the light to the correct locations required and that the cabin of the helicopter was very noisy. There was no time for him to count the vehicles, nor could he recount seeing any of them in motion.

[169] *He testified that the helicopter light was activated before they got to the scene. As they took off from the last point, he activated the light and it was already active prior to them reaching the scene.*

[170] Furthermore, he was questioned about the pilot's log: the helicopter took off from a field near Sasolburg at 21h20, which he confirmed. He also confirmed the shutdown in Germiston at 22h05. He confirmed that the helicopter used on the night was the same as the one depicted in the photographs. He was also questioned about the 'CIT' inscription. He testified that it meant cash-in-transit and confirmed that it was about cash-in-transit robbers proceeding from KZN to Gauteng. However, he confirmed that the helicopter played no role in stopping the vehicles, it was only there to render air support to the ground units.

Evaluation

[171] This witness could clearly not remember the specific incident in detail. The contradictions to the evidence presented by Khunou is thus understandable. Khunou's evidence was explained clearer, in greater detail and is simply more reliable. Crucially, the conclusion is, however, drawn from the evidence presented by both that the helicopter was clearly visible and audible from the ground.

8. *Ngaka Frans Mokoena (Mokoena)*

[172] During May 2019, Mokoena was employed at the Zamdela SAPS VISPOL as the Community Service Centre Commander. He joined the police in 2011 and had twelve years' experience at the time he testified. He was on duty on the 16 May 2019.

[173] His relief commander informed him of a shooting near the intersection of the R57 and R82 roads. He was assigned to assist at the scene. He went with two charge office colleagues and met Renken along the R57, who briefed them and led them to the crime scene.

[174] Present were an ambulance and a vehicle, which he identified as a white Ford Ranger. Renken informed him that an individual had sustained a gunshot injury and was receiving medical attention inside the ambulance. Mokoena proceeded to the ambulance, where he introduced himself. The injured person identified himself as Simon Monareng, the driver of the vehicle, and provided his residential address and cell phone numbers.

[175] Renken then took him to the vehicle at the scene which was not far from where the ambulance was. The first thing that Mokoena noticed was multiple holes in the vehicle and that the front driver's window was shattered. Blood was visible on the front passenger door and there were cell phones on the left side of the vehicle's floor. There was also a firearm lying on the passenger front side where 'the feet rests when someone sits in the vehicle on the front passenger seat'.

[176] He notified Zamdela and requested that members of the LCRC and standby detectives from Zamdela attend the scene. At that time, he was in communication with Renken and his colleagues, who were occupying themselves by securing the area in relation to traffic concerns. The area was being secured because the vehicle was located just off the road on the left-hand side, near the tarred road. The Ford Ranger was positioned on the left side of the road and was facing the R57 and R82 intersection.

[177] One of his colleagues, Constable Thobeha from the LCRC arrived, and Mokoena identified the firearm, cell phones, and cartridges for him. Thobeha photographed the evidence, removed and sealed the firearm, while Mokoena remained on site until the towing services were finished. Renken informed him that they were investigating a murder and cash-in-transit case originating from KZN and provided him with a list of the members who had been deployed at the scene, which he attached to his statement before departing. Subsequently, following protocol, he opened a case of attempted murder against the Task Team members. He could not recall who fired any firearm nor could he recall Renken mentioning that police officers were shot at during the incident.

Evaluation

[178] The witness was a matter-of-fact type of witness. He testified what he observed and experienced. He did not have any involvement in the case and only arrived afterwards. It was clear that his involvement in the matter only pertained to securing the scene, ensuring the veracity of the evidence confiscated and also opening a charge of attempted murder against the Special Task Force members. It is significant to note that, but for the allegation that the firearm was planted by somebody, the chain of evidence and evidence reflected in the case were not disputed.

9. *Sello Solomon Thobeha (Thobeha)*

[179] Thobeha was a Sergeant in 2019 and held the rank of Warrant Officer at the time of his testimony. In 2019 he was attached to the Zamdela LCRC with eighteen years' service in the SAPS and has received intensive internal training in the SAPS. He confirmed that he is a criminalistics expert with the LCRC since 2008. As such, he specialises, *inter alia*, in fingerprints. His role on that particular day was to attend to the scene by taking photographs and collecting exhibits. The Zamdela SAPS Control Room called and requested him to go to the scene.

[180] He was referred to page 54 of the trial bundle, which is a cover letter prepared by him, addressed to his Commander and to Zamdela Station. The letter is dated 4 June 2019 and contained a number of attachments. He confirmed the attached documents were a forensic cover letter, forensic statement, a photographic statement, a key to a photo plan with photographs, and a sketch plan. He was referred to page 58 of the trial bundle and confirmed that he made the statement.

He confirmed that it states that he was stationed at the Local Criminal Centre, Zamdela as an official draughtsman and photographer.

[181] He was referred to pages 55 to 57 of the trial bundle and confirmed that this was another sworn statement signed by himself. The purpose was to inform the investigating officer and the Court about the fingerprint investigation and the identification of fingerprints that were found on the vehicle. He was referred to the second paragraph on page 88 of the trial bundle and confirmed the distances that were depicted there. The evidence referred to was admitted into evidence by this Court.

[182] He observed and noted the following:

- a) The marked vehicle from the Zamdela police station;
- b) there were numerous other people present whom he did not know;
- c) on the side of the road there was a white vehicle, a Ford Ranger. It was on the R57 facing south-east. He testified that it was stationary;
- d) upon his arrival to the scene, he was taken to the vehicle by one Mokoena and a gentleman from KZN who was with the SAPS. At that time there was nobody in or around the vehicle;
- e) Mokoena explained to him what had happened. His purpose in going to the vehicle was to do a criminal investigation where he then started with the processing of the scene. He was also informed that the firearm was still in the white Ford Ranger together with other items, like cell phones, which were left in the vehicle;

- f) Photographs 1 to 10 were taken during the daylight on 17 May 2019 between 11h00 and 12h00. Photographs 11 to 38 were taken by him on 16 May 2019 from 23h20 until 02h20 on 17 May 2019;
- g) he went to the R57 road near Beltrum farm, twice. The first time was on 16 May 2019 when he was called by the radio control. The second time was on 17 May 2019 for purposes of taking photos during the daylight and searching for further exhibits or evidence;
- h) with reference to photographs 27 and 28 on page 74 of the trial bundle, he testified that they were taken at night and the purpose was to indicate where the 9mm pistol was allegedly found in the white Ford Ranger;
- i) with reference to photograph 33, a swab was taken from the firearm. He testified that the exhibit number is A6. He testified that he swabbed the entire external part of the firearm, using only one swab.
- j) With reference to photograph 48, he confirmed that three of the four tyres were deflated. The left rear tyre, which is visible on photograph 47 on page 84, appeared intact;
- k) item 31 on photograph 74 depicted exhibit A12, which was a swab with blood collected from the inner side of the Ford Ranger with registration number DR[...]. Likewise with exhibit A3, he testified as to the numbering of the exhibit bags and that he personally booked it in for safekeeping;
- l) Renken was the one who indicated the firearm that was found on the floor of the vehicle on the passenger side. When he got to the scene, it was guarded, including the Ford Ranger vehicle;
- m) he went back the next day because there were allegations that the occupants or the driver of the Ford Ranger shot at the police and that a pistol was found in the vehicle. Due to the darkness and the long grass at the scene, he could not find any

bullet cartridges that could fit the pistol. This is why he returned to the scene the following day as he could conduct a more thorough search in daylight for any additional cartridges. He combed a radius of ten meters from where the vehicle was found;

n) with reference to exhibits 1A1 and 1A2, the cartridges were 60 centimetres apart from each other. The distance between 1A2 and 1A3 was 80cm;

o) there were no visible latent fingerprints on the firearm;

p) on the second day, when the vehicle was parked at the Zamdela SAPS vehicle booth, he searched for latent prints on the vehicle. A latent print is a print that is made with the friction skin of a palm, the inner side of a palm and the fingers. He was requested to examine for the presence of latent prints by Renken. He testified that the print lifted with adhesive tape, the third one mentioned at the top of page 181, was on the outer side of the number plate found attached to the rear of Mr Monareng's white Ford Ranger. He found a palm print.

q) The print, after being photographed and lifted, would be sent to the Automated Fingerprint Identification Database. On 20 June 2019, he compared the latent prints on photograph image 4544 and 4587 and lifter 23 adhesive tape with the set of fingerprints and palm prints number 2016 KMJ 692. *Two of the prints collected by Thobeha corresponded with the prints on the database. Thobeha testified that the prints belonged to Molefi Simon Monareng. The left middle finger also matched Monareng's. He provided an explanation as to how the prints were matched.*

[183] At this stage, counsel for the plaintiff now indicated that the manner in which the evidence was collected remained in dispute, but that the chain of events

in respect of what he collected and packed, and that it went uncontaminated to the tester, was not disputed.

[184] As regards to Thobeha's visit to the scene the next day when he searched within a ten meters radius from where the Ford Ranger had been stationary, he testified that the traffic was normal. The road was not closed but the scene was still cordoned off. He did not test whether the substance appearing on the bottom left of photograph 27 was blood. He testified that the blood that had been transferred to the front passenger seat was because the injured person moved. The blood seen on photograph 27 was probably due to the person moving but Thobeha said he was not going to speculate on whether blood would be spilled on whatever was in the vicinity when the injured person moved.

[185] He confirmed that he specifically searched for epithelial cells on the firearm which are from touch-DNA. It was put to Thobeha that, although he was looking for touch-DNA, he could easily have picked-up other DNA sources as well. *Thobeha disagreed and said that he wanted to prove that the person was in contact with the firearm. There were two ways that he could do that, either through fingerprints or touch-DNA. He could not find any fingerprint. It was touch-DNA, and there was not any other source of DNA.*

[186] *He was asked by the Court if the firearm was placed right upon the blood that was present, so the blood will then be transferred to the firearm and that is how the DNA would come to be found on the firearm. Thobeha responded that in terms of probabilities he did not want to lie to the Court. He would not be able to answer the question. He did not know.* It was put to Thobeha that, with the gun

lying on its right side in the footwell, if it was placed there subsequent to the incident and was placed on the blood, could there have been possible contamination between the blood on the carpet and the gun. Thobeha answered that he was dealing only with touch-DNA, so he could not give a satisfactory answer as far as blood or alleged blood was concerned – his intention was to get possible touch-DNA.

[187] Thobeha testified that Renken had informed him that shots were fired from the white Ford Ranger while it was moving. It was put to Thobeha that the back seat occupant of the Ford Ranger, Xulu, would testify that she was on the scene until early the next morning when she was taken by Renken and a colleague to Benoni. Thobeha did not see her there. She would also testify that the windows of the Ford Ranger were closed during the incident, at least until the vehicle became stationary. Thobeha could not take issue with that.

[188] *Xulu was never called by the plaintiff. The statements thus carry no weight. Important is that it is the case for the plaintiff that his two passengers were asleep at the time of the incident.*

[189] During re-examination Thobeha confirmed that he did not testify that there were no rounds in the chamber. He returned to the scene the next day, searched a radius of ten meters from where the vehicle was found but could not find any cartridge cases fitting the pistol. He found no visible latent fingerprints on the firearm and confirmed that blood spatter was found on the front seats and centre console of the vehicle. He was questioned on whether he had instructed forensics to do any test to determine whether the gun was fired, as contended. He answered

that he requested ballistics to analyse whether the firearm was in working condition or not. It was put to him that this was not to determine whether it was indeed fired but simply to ascertain whether it was in a working condition. Thobeha answered that that was the purpose.

Evaluation

[190] The witness was a good witness and testified within his expertise and abilities. His evidence is accepted as trustworthy and dependable. He did not testify of any blood that was on the firearm.

10. *Jeanie Eileen Jana van Dyk (Van Dyk)*

[191] Van Dyk is a Warrant Officer and stationed as a reporting officer at the Forensic Science Laboratory in Pretoria. She compiled the report in this matter under the Zamdela CAS number of 188/5/2019, once the DNA analysis was conducted. She confirmed her qualifications and expertise in DNA analysis and explained the process when samples are sent to her unit for testing.

[192] She detailed her evidence with reference to Table 1 of her report that was admitted into evidence which set out the DNA results at the end of the process. The first column is titled ‘samples’. That is the specific exhibits under comparison in her report. The first line refers to all the exhibits compared, in this case, the swab A6 from the Zamdela case. Following that is a reference sample that was taken under the Orange Farm cas docket. It was marked ‘S Monareng’ and was contained in kit 16 DBBU 4244 and in the evidence sealing bag PA 4003181907. Following that, they have a reference sample that was taken under the

Vanderbijlpark cas docket. This sample was marked ‘SM Monareng’ and was contained in kit 16 DBBU 4451 and sealed in bag PA 4003182114.

[193] She indicated affirmatively that swab A6 referred to the swab with possible touch-DNA from the 9mm pistol found inside the suspect’s vehicle and they could say with confidence that the DNA found on swab A6 came *from a single donor and that is the DNA of the plaintiff SM Monareng*.

[194] *In response to a question from the court, she testified that they can only say that the individual’s DNA was found on the exhibit and not the substance that caused the DNA to be on the object, in this case, the firearm.*

[195] *The DNA result from A6 in the Zamdela case matched the DNA result from the reference samples in Orange Farms and Vanderbijlpark cases. As such, the plaintiff is connected to these cases.*

[196] During cross-examination she confirmed that she could not say what the source of the DNA was. She testified that the DNA obtained from the swabs allegedly taken from the gun indicated one person’s DNA. She said that *when a clean sample like the one in question is received, it was likely that only one person handled it. It was put to her that the plaintiff would argue that something like a gun that has been handled by various persons could carry more than one donor. She responded that if it were handed by multiple people there will be multiple results; but in this case they got a nice clean single donor profile.*

Evaluation

[197] The witness was an excellent witness. She explained her findings and neither parties could dispute it with conviction. The main concern with her evidence is that she cannot identify the source of the DNA on the firearm – whether it was the blood of the plaintiff or merely caused by his touch to be on the firearm. It eventuated by suggestions and instructions from the plaintiff that the firearm was ‘planted’ by the police to justify their shooting. The DNA might have resulted from the blood that was in the vehicle due to his injury. She could, however, not resolve this scenario.

11. *Leon de Klerk (De Klerk)*

[198] De Klerk was a Warrant Officer in the SAPS. He resigned in 2022. In 2019 he was stationed at the Zamdela Vehicle Crime Investigation Unit. He joined the SAPS in 1987. His field of specialization is the inspection of motor vehicles involved in theft and hijackings, among others. He was also, for many years, a so-called vehicle clearance official that issued vehicle clearance certificates for export or general registration. At the time of his involvement in this case he inspected on average five suspected stolen vehicles per week.

[199] He went on to explain, in detail, the processes that are followed when vehicles are inspected. He identified and confirmed the SAP 430(f) document, a vehicle investigation statement or report at page 173 of the trial bundle, which he completed. The purpose of the document was to relay the information regarding a vehicle that he physically investigated. The primary objective was to examine the vehicle in order to verify whether all numbers affixed by the manufacturer were original and to confirm whether the number plates and disc attached to the vehicle corresponded to that specific vehicle.

[200] It was verified that the vehicle in question was recorded in the SAP 13 at Zamdela. It is common cause that it is the vehicle driven by the plaintiff during the incident. On 5 June 2019 he inspected the vehicle in question and established that:

- a) The vehicle was on the eNatis system. He explained that the eNatis system is the National Administration for traffic and was basically the registration department of the National Traffic system;
- b) the vehicle identification number (VIN) is the identifying code for a specific automobile. The VIN serves as the car's fingerprint, as no two vehicles in operation have the same VIN. A VIN is composed of 17 characters (digits and capital letters) that act as a unique identifier for the vehicle;
- c) the VIN sticker in the Ford Ranger in issue that is situated on the pillar or the post of the driver's door and in the door, is not original and had been tampered with. He noticed that the sticker inside the door was not consistent with what he usually detects with an original vehicle and gave his reasons for the finding. De Klerk testified that the original VIN number of the vehicle was removed, it was either sanded or grinded off. The number was re-stamped to change the identification of the vehicle.
- d) He found that the number plate was false. After de Klerk checked the VIN number, he checked the engine number which is very difficult to get to. He found the engine number and took a photograph of it. The engine number was found to be original as the factory would attach it to the engine.
- e) *The original engine number was fed into the SAPS Vehicle Circulation System and was reported as robbed from the owner under KwaMashu CAS 317/12/2018. He confirmed that there was a complaint relating to the vehicle. He*

testified that the complaint was a hijacking. The vehicle had been robbed from the owner and was a stolen vehicle.

f) The license disc belonged to the Ford Ranger and corresponded with the VIN number and the registration number but not the engine number on the vehicle.

g) During cross-examination he conceded that his findings were *ex post facto* the incident.

Evaluation

[201] The evidence of the witness cannot be faulted and the fact that the information that the vehicle was suspected to be stolen was confirmed *ex post facto* does not help the case for the plaintiff. It adds veracity to the conduct and evidence of the members of the defendant about the incident. *The plaintiff was driving a vehicle that was hijacked as recently as December 2018 before May 2019.*

12. *Hendrina Johanna Blignaut (Blignaut)*

[202] She is a Captain in the SAPS based at the Forensic Science Laboratory, Ballistic Section in Silverton, Pretoria since 1999. Before this she was with the Guard Unit, Public Policing Unit, Flying Squad and then ballistics. Her extensive expertise and qualifications were admitted by the plaintiff and the documents pertaining to her evidence were admitted into evidence by agreement between the parties.

[203] She was on crime scene standby and requested to examine a vehicle that was involved in the shooting incident. She confirmed that the vehicle in question is the white Ford Ranger with registration number DR[...]. She was requested to

determine the direction of the shots that were fired and if there were any shots fired from inside the vehicle, and any shots fired from outside. She inspected the vehicle 20 May 2019 at Zamdela Police Station.

[204] When she examined the vehicle, her first view of the vehicle was that there was a concentration of damage on the right side of the vehicle. There was the driver's window, as well as the front passenger's window that was broken and three of the tyres were also deflated. There were defects on the windscreen and there was a defect on the rear window as well as in the load bin – the back flip door. Each defect was given an alphabetical number from A to DD, so there were 30 in total, excluding the tyres.

[205] Both tyres on the right (the driver's side) were deflated as well as the left front tyre. She was asked why she did not note the defects or damage to the tyres and answered that she normally does not mention it because it is obvious that they have been damaged as they were deflated. As such, they normally do not examine the tyres; they are normally examined by a mechanical engineer if there is any issue. For her it was not important to focus on the tyres because you could see the vehicle was involved in a shooting, so it makes sense that it was shot at. She did not identify the bullet holes because when you shoot at tyres with ammunition normally the rubber closes up on itself, so you cannot really see it again.

[206] *She was questioned with reference to page 114 of the trial bundle, whether the bullet holes in her view were high or low shots and she responded that the majority of the shots were low shots.* She described the other bullet holes and defects in the vehicle and explained what she meant by stable and unstable bullets.

[207] It was put to Blignaut that she had not included the hole in the driver's window of the vehicle nor any of the shots to the tyres, and this could take the number up to 34. If one deducted the two exit holes and the four marks on the windscreen which were also from the inside, then the number reduced to 28. She explained that she only counted damage. The specific marks do not necessarily indicate a shot. Blignaut testified with reference to photograph 39 that it was only three shots. With one shot, it could enter, exit, re-enter and re-exit. She referred to the fragments on the dashboard and said it was difficult to say whether it was caused by one or two bullets. Photograph 44 depicted one bullet in the vicinity of the speedometer.

[208] It was put to the witness that the plaintiff's argument would be that with the majority of the holes being more or less horizontal, it was more in line with people firing while they are stationary. Blignaut replied that she was not going to answer the question. She testified that she would have to physically examine the scene properly and get more information through reconstruction to see if their version could be possible or not. She testified that she was only given the vehicle to examine in order to assist in determining the direction of the shots fired, which is exactly what she did.

[209] *Counsel for the plaintiff argued that in her testimony she avoided questions on the evident fragments which accorded with stable firing and clearly orientated to passenger height. This is not correct. She refused an opinion because she did not do the examination on the scenario suggested.*

[210] *Counsel further argued that her evidence confirmed that no shots were fired from inside the vehicle. This is again not true or correct. She never testified as such, however,* the argument that there are at least twenty-two independent firearm ‘hits’ may be correct. It is correct that at least six bullets entered the cabin and three did not have evident exit holes. Photograph 27, taken on the night of the incident, shows dark spots on a Valpre water bottle and red marks on the carpet and console, which would likely be blood. Photograph 48 shows that almost all trajectories are horizontal, however, there are a few which appear to have an upward trajectory, namely on the backdoor marked T and on the driver’s, door marked M, J and S.

Evaluation

[211] The witness was excellent in the trustworthiness and credibility of her evidence. She refused to be coaxed into speculation and maintained her evidence to her field of expertise and observations. Crucial is that the majority of the shots aimed at the vehicle under difficult conditions, were low. The police did not aim to kill and the results are evident. None of the other occupants were hit and the plaintiff was struck in his lower leg.

13. *Simon Molefe Monareng (Plaintiff/Monareng)*

[212] It is the case for the plaintiff that he is an ‘innocent bystander’ that was only driving the vehicle. He was under the impression that they were being hijacked and he attempted to evade the attack by fleeing to seek help from some police vehicles that he noticed back in the road. He was shot in the leg, arrested and taken to

hospital. The SAPS had an ambulance on stand-by and the plaintiff received immediate medical attention.

[213] At the time of the incident, he was resident in Evaton. He has known Menyuka for many years as they lived in the same vicinity. *After all the years of knowing Menyuka, he does not know how he, Menyuka, makes a living or where he worked. (From Menyuka's 204-statement it is clear that he is a career criminal that specialises in cash-in-transit and hijacking crimes.)*

[214] Regarding the incident, he stated that he was traveling to Vanderbijlpark. As he crossed the R82, he observed two marked police vehicles parked along the road on the left, as well as an ambulance. After crossing the intersection, a Grand Cherokee Jeep approached from his left and moved in front of his vehicle. He was driving on the right, while the Jeep was on the left before merging ahead of him. In response, he executed a U-turn, referencing the presence of the police vehicles he had passed. He indicated that his actions were on account of the way the Jeep cut into his path, as he considered the possibility of it being a hijacking attempt.

[215] He testified that: ‘. . .After executing this U-turn, a flurry of gunshots went off’. He was trying to hide his body so as not to be hit by the bullet. *The shot or shots hit him after he executed a U-turn. On a question from his counsel, he indicated that when the incident commenced, his passengers were asleep.* He testified that: ‘It is me that told Siboniso that we must execute a U-turn because we are being shot at’. *From his evidence it is clear that Menyuka was now awake before the U-turn. This is in contradiction with the evidence above.*

[216] He confirmed that his vehicle came to a stop on the other side of the lanes that travel from north to south. When the vehicle stopped, he alighted through the left passenger door. He exited on the left because the bullets were coming from the right side. While he was lying on the ground the police officers arrived and asked where the money as well as the firearms were. He answered that he does not know anything about that. Monareng was cross-examined as to why his statement did not mention that the police questioned them about money. He once again stated that it was how the writer wrote it. *The plaintiff confirms with the evidence that the SAPS had a suspicion of illegal firearms and money in the vehicle.*

[217] He testified that he never possessed a gun and that no shots were fired from his vehicle. Also, he never appeared in court regarding this incident. He could, however, not explain the gunfire damage to the Jeep Cherokee that Masilo referred to. He was questioned about the firearm that was found in the vehicle and testified that it was not his firearm and he did not know whether it was Menyuka's, as he did not see the firearm in the vehicle. It was put to him that the firearm was noticeable in the motor vehicle as depicted on the photographs in the trial bundle and it was also put to him that his DNA was found on the firearm. Monareng, however, simply answered that he does not know anything about it. Furthermore, he was questioned as to how he would explain his DNA on the firearm, which he could also not answer. Ultimately therefore, the implication of the cross-examination by his counsel of the defendant's witnesses is that the firearm was a set-up by the police to cover their conduct. The same goes for the DNA.

[218] It was further put to Monareng that there is evidence that the entire firearm, including the magazine, was swabbed and only Monareng's DNA was found. He

again answered he would not know. Monareng testified that he was sure he did not touch the firearm on that evening.

[219] The witness was referred to page 447 of the trial bundle and he confirmed that it was his identity number appearing on the document as well as his name together with his date of birth. With reference to the document, it was put to Monareng that he had three cases pending against him, one of them in Bekkersdal under the (now repealed) Arms and Ammunition Act 75 of 1969. He confirmed that he was, indeed, on trial in Bekkersdal. He was then cross-examined to explain why he was on trial and charged under this Act if his evidence was that he never possessed a firearm. He replied that the reason for this charge against him was that he was found in possession of a tractor that was suspected of being stolen. Monareng confirmed that he was convicted. He evaded to answer to the charge under the firearms legislation and just returned to the possession of the tractor.

[220] He was further questioned whether he denies that he was found guilty in terms of the Arms and Ammunition Act, where to he answered that he does not deny it because it is what was written on the document. He then changed his version and stated that he confirms that he was convicted in Bekkersdal but not for a firearm and ammunition. It was put to him that he was also convicted in Bekkersdal for robbing a business. Monareng referred to a tractor incident.

[221] The Court clarified whether Monareng was convicted under the Arms and Ammunition Act to which he answered affirmatively. The Court also clarified that he was sentenced to ten years' imprisonment. Monareng agreed but added that it was suspended.

[222] He was further cross-examined about a Brackendowns cas number for robbery where the charge was withdrawn, which he confirmed. He was also cross-examined about an Orange Farm robbery. Monareng answered that it was also withdrawn.

[223] It was put to him that he testified that he went to KZN to fix a Mercedes. He was questioned why it was necessary for a motor mechanic to go from Gauteng to KZN to fix a vehicle and his reply was that it was how he did business. The gearbox of the Mercedes was not changing normally and one Sibonelo Ngoma's brother-in-law paid him for his services. *This witness was not called to testify.*

[224] He was questioned on a discrepancy between his affidavit and his evidence in court; he testified that he checked the gearbox on the 15th but the affidavit refers to the 16th, a mistake which he attributed to the writer of the statement. He was given an opportunity to examine the affidavit and drew the Court's attention to another apparent mistake, namely the allegation that he left Port Shepstone with Siboniso Menyuka and his girlfriend Thando. Thando, however, was not with them.

[225] It was put to him that a witness testified that the vehicle had false number plates, to which Monareng responded that he bore no knowledge of that. It was also put to him that another witness lifted prints from the rear number plate and some prints came back as his. He answered that it was possible because he was using both hands when he washed the vehicle.

[226] He further testified the Ford Ranger itself did not give any problems apart from the issue with two of the gears. Monareng was referred to the statement of Menyuka where he deals with the problem with the car. He stated that it was ‘cutting’ when they drove. Monareng persisted that the problem was with the gears. He was referred to the affidavit of Xulu where she also stated that the vehicle started to have mechanical problems. Vitally, *Monareng answered that Menyuka and Xulu were untruthful.*

[227] It was further put to him that the manufacturer’s mark or plate on the post of the motor vehicle on the driver’s side had been tampered with and this evidence was unchallenged. He answered that he did not know about that. It was put to him there was also unchallenged evidence that the VIN number on the chassis had been tampered with. He once again answered that he did not know about that.

[228] *Monareng testified that it was only his vehicle and the Jeep before he made a U-turn.* When asked why he believed he was being hijacked, he answered by saying that the Jeep cut sharply in front of him. He explained that moving to the left lane would have caused a collision since the Jeep approached from that side. *This response contradicts his earlier claim that the Jeep was ahead of him.* It was put to him that Motlhoioa testified that he came up behind his vehicle in the left lane, passed him and merged into the right lane in front of him. It was further put to him that Motlhoioa testified that once the Jeep was in the same lane in which Monareng’s vehicle was travelling, it braked. Monareng, however, denied this. He was then asked, considering his contention that numerous mistakes were evident, why he did not give instructions to his legal team that the evidence was incorrect, as he was sitting in court. He simply answered that he was not asked about it.

Furthermore, it was put to him that his version about the Jeep cutting in front of him at an angle was the first time that this evidence was placed before court. He answered that it would be the first time because that is just what happened, and what he told his legal representatives.

[229] Monareng was cross-examined on his version that he was five hundred metres from the intersection when the Jeep cut in front of him, contrary to what is stated in the letter of his attorney of record indicating five kilometres. He could not explain this. It was also put to him that a BMW and a Ford Ranger vehicle were also present, to which he replied that he did not notice. Furthermore, it was put to Monareng that evidence was presented about a box-in manoeuvre which was never denied. He could not explain this but testified that he saw a helicopter when he was arrested. He testified he saw the light and heard the engine while he was on the ground being arrested.

[230] It was put to the witness that there was evidence that a muzzle flash was observed from his motor vehicle. *He answered that he could not say there was this flash of a firearm because his passengers were asleep. This evidence does not make sense in light of the evidence that he told Menyuka that he was going to make a U-turn.*

[231] It was put to him that from the medical report submitted, he had a shattered tibia and fibula caused by an injury below the knee. He confirmed this and confirmed that Xulu and Menyuka were not injured.

[232] Monareng was asked how, faced with three vehicles with blue lights, sirens blaring and a marked police helicopter hovering in the air, he could possibly be under the impression that he was about to be the victim of a hijacking. He answered that the only vehicle that was visible was the Jeep. He did not see other vehicles.

[233] Lastly, he was cross-examined about the damage to the Jeep motor vehicle and replied that he did not see anything. The cross-examination was completed and the plaintiff was not re-examined.

Evaluation

[234] The plaintiff was not a good witness. He was vague on his previous convictions and contradicted himself on whether and when his passengers were asleep, awake and when the shots started. The improbabilities in his evidence are grave and rife.

[235] Numerous witnesses testified that the three unmarked SAPS vehicles were clearly visible and audible. He only saw one vehicle that did not have sirens or blue lights on. In addition, the issue of the firearm is farfetched, to say the least. Even if the firearm was a fabrication of evidence, the fact remains that DNA of the plaintiff was found on the firearm which could not have been planted by the police. The witness endeavoured to distance himself completely from firearms by stating that he has never been in possession of any firearms, but his record of previous cases clearly depicted the opposite. Ultimately, his reaction to the firearm appears desperate.

[236] His print on the falsified numberplates is a crucial fact. His explanation of having washed the car on the conspectus of evidence is shaky at best. In addition, he appears to be a man who has had multiple previous clashes with the law. The warning to the Task Force that contact with the Ford Ranger may pose severe danger due to the occupants in the vehicle, proved to be well-founded. Strangely, only the plaintiff testified and not the lady nor Menyuka. His counsel also did not have any issues in re-examination to clarify. In conclusion therefore, his evidence is rejected as being without any veracity.

Evaluation of evidence and findings

[237] The effect of the evaluation of the evidence as per each witness above directs to the acceptance of the Court of the version of the defendant. The evidence of the witnesses for the defendant is corroborated by objective and diverse sources and the probabilities are solidly in their favour. The case for the applicant on his evidence is weak and unsubstantiated. He was not without recourse; he could have invoked the evidence of his two co-passengers. The fact that he chose not to, and without any explanation, is telling.

[238] Only four of the twelve members of the Special Task Force deployed on the night of 16 May 2019 were still in the police service at the time of this trial, namely, Motlhoioa, Kabini, Masilo and Fanampi. The fact that all the members did not testify does not detract from the case of the defendant in any manner.

[239] The following is now proven or trite:

- a) The members of the Special Task Force are all 'arrestors' in terms of s 49. They were authorised under the CPA to arrest or to assist in arresting a suspect, which they eventually did and lawfully so.
- b) At all material times, these policemen who shot at the plaintiff's vehicle acted within the course and scope of their employment with the defendant.
- c) The information on which the incident is based showed, beyond any doubt, that Menyuka, who was in the vehicle and who was the target of the arrest, was a '*suspect*' in terms of the CPA. It was proven beyond any doubt that there was a real and reasonable suspicion that he was a person that had committed serious and violent offences. It was corroborated *ex post facto* to be the reality.
- d) It later eventuated that the plaintiff was also involved in crime and had several clashes with the law and with regards to violent crimes. He was driving a suspected stolen vehicle which was later proven to be a vehicle that was stolen in a robbery.
- e) The evidence on a balance of probabilities shows that the plaintiff and/or Menyuka fired shots at the police. Only the plaintiff's DNA was on the firearm located in the vehicle and the magazine of the firearm was not fully loaded. Additionally, the firearm was in the illegal possession of the plaintiff and/or Menyuka and the identification marks on the firearm were tampered with. Lastly, the SAPS Jeep was damaged by what was presumed to be gunfire.
- f) The offences involved previously and during the incident were and are beyond any doubt, not even on reasonable grounds, crimes involving the infliction or threatened infliction of serious bodily harm. The police were well briefed on this, hence the utilisation of the Special Task Team, the Airwing and all the peripheral measures.

g) The act of arrest was clear. Three vehicles with sirens and blue lights and a police helicopter were involved. Objectively, and on the evidence accepted by the Court here, there is nothing more that the police could do under the circumstances to make their intention of arrest visible.

h) On all probabilities, the plaintiff realised that they were on the verge of being arrested, hence the attempt to flee. His fingerprints were on the falsified number plates, he knew the vehicle was stolen, shots were fired at the clearly visible police vehicles, and the plaintiff had been involved in arrests of himself previously; he was well versed with a situation of this kind. That said, even if his version is accepted, the fact remains that he was fleeing and that the police subjectively, with real cause, perceived it to be from their attempt to arrest him.

i) The police, with all the resources at their disposal; three vehicles, a helicopter and other police vehicles parked further down the road, did not have to use lethal force and there is no indication that they necessarily intended to. Rather, they were obliged to resort to the use of force in self-defence after being shot at, to protect, firstly the public in residential built-up areas from the indiscriminate shots emanating from the suspects, as well as to safeguard the lives of the other members and people involved. *They had to protect the public in general from the perpetual perpetration of serious crimes by the plaintiff and Menyuka that involved grievous bodily harm and even death.*

j) It is an indisputable and certain fact that both Menyuka and the plaintiff are dangerous suspects and convicted criminals. They were well known to the justice system and the police had been searching for Menyuka since at least February 2019. There are and were no other reasonable means of effecting the arrest, whether at that time or later. The suspect(s) were people that offended blatantly and unceasingly and cared little for the trail of blood and loss of life in their wake.

The indication at that time was that they cannot be allowed to roam the streets freely, leaving the public at the mercy of their perverted whims; this apart from the dangerous situation that prevailed at the time of the incident. The suspect(s) posed a threat of serious violence to the arrestor(s) and other persons; at the time and in future.

k) There was not any other form of force that could have been utilised. Notwithstanding the extensive amount of shots that were fired, the only injury was the injury on the lower leg of the plaintiff. The compelling evidence is that three of the tyres were shot out and that the majority of the shots were aimed low so as not to, in the event of hitting an occupant, injure them seriously. It was only the plaintiff that was injured; the other occupants were not harmed in any way whatsoever.

l) The only force that could have been applied was the deadly force as described in the CPA. Although severe, it was not deadly and only because of the professional, disciplined, and constrained conduct of the police. The consequences in the circumstances that prevailed could have been worse if it were not for the extensive skill and experience of the Task Force members.

m) The injury to the lower leg of the plaintiff is not conclusive of the merits of the case in his favour. The location of the wound is telling – a restrained amount of force was utilised. The plaintiff is, directly so, the architect of his own fate.

n) The Special Task Force acted well within the limits of *Walters* and the ambit of s 49.

Conclusion

[240] The claims on the merits stand to be dismissed. The plaintiff was unsuccessful and, on the facts, opportunistic. He will have to carry the costs of the litigation.

Order

[241] In the result, the following order is made:

The plaintiff's claims are dismissed on the merits and with costs, inclusive of costs of two counsel to be taxed on scale C in terms of uniform rule 67A. Costs shall include all costs reserved.

OPPERMAN J

Appearances

For plaintiff:	P Uys Sandton
Instructed by:	Logan Naidoo Attorneys Houghton
c/o	Webbers Attorneys Bloemfontein
For defendant:	R T Williams SC D De Kock Cape Town & Bloemfontein
Instructed by:	State Attorneys

Bloemfontein