



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 20196/2023

In the matter between:

MOTSAMAI SAMUEL MOKONE

Plaintiff

and

**MINISTER OF POLICE
SIYABONGA CISHE**

First defendant
Second defendant

JUDGMENT DELIVERED ON 16 OCTOBER 2025

VAN ZYL AJ:

Introduction

1. This is a delictual claim for damages in which the plaintiff alleges that he was unlawfully shot, arrested, and detained by members of the South African Police Service (SAPS), for whose conduct the first defendant is vicariously liable. The particulars of claim also include allegations of assault, but the plaintiff's counsel indicated during oral argument that no reliance was placed thereon for the purposes of the plaintiff's claim.

2. The defendants admit that on Friday, 10 February 2023, the plaintiff was shot, arrested without a warrant of arrest, and detained by SAPS members acting within their course and scope of employment with the Minister. They deny, however, that the plaintiff was assaulted in any way other than the gunshot wound he sustained.
3. The second defendant is a member of the SAPS, and one of the persons with whom the plaintiff interacted on the day in question. The interaction between the plaintiff and second defendant started the chain of events which led to the plaintiff's injury, arrest, and detention.

The issues to be determined on the pleadings

4. The Court is required to determine the merits of the claim at this stage, merits and *quantum* having been separated at the outset of the trial.¹ In a joint practice note agreed to between them shortly before the commencement of the trial the parties delineated the issues for determination as follows:
 - 4.1. Whether the defendant's employees wrongfully and unlawfully arrested and detained the plaintiff; and
 - 4.2. Whether the defendant's employees wrongfully and unlawfully shot at the plaintiff with a firearm, and injured him.
5. As indicated, the shooting, arrest, and detention of the plaintiff by members of the SAPS are not in dispute. The plaintiff set out, in the particulars of claim, the bases upon which he relied in claiming that these actions constituted unlawful conduct. It was common cause at the trial that the *onus* fell on the defendants to justify their actions in such circumstances to succeed with their defence, and they

¹ The bases for the damages claimed in the particulars of claim include unlawful arrest and detention, shooting and assault, pain, suffering, and *contumelia*, post-traumatic stress disorder, and past and future medical expenses.

had the duty to begin. The *onus* never shifted.²

6. In their defence, and by way of an amended plea^{3 4} delivered on the first day of the trial, the defendants pleaded as follows:⁵

"20. Without derogating from the generality of the aforesaid, the defendants avers that the arrest of the plaintiff was for a reasonable cause and was effected in lawful manner and justified by the provisions contained in section 40(1)(b) and 49(1) and (2) of the Criminal Procedure Act, 51 of 1977 ('CPA') in that:

- 20.1 the plaintiff committed a crime in front of the second defendant and his colleague by pointing what appeared to be a firearm at the second defendant which led him to being chased by the second defendant and other members of the SAPS and which chase resulted in him being injured and arrested without a warrant of arrest; and
- 20.2 the plaintiff sought to defeat the ends of justice by failing to stop his vehicle when he was chased by members of SAPS and despite being signalled to stop his vehicle by the SAPS members."

7. Counsel for the plaintiff argued that it appeared over the course of the trial that the defendants' evidence did not support the allegations in paragraphs 20.1 and 20.2 of the amended plea. Counsel argued further that the evidence led in any event did not assist the defendants in overcoming the requirements of either section 40(1)(b) or section 49(1) and (2) of the Criminal Procedure Act 51 of 1977 (the CPA), on which the defendants relied in their plea.

8. I proceed to deal with the requirements of these provisions in the context of the pleadings and the relevant evidence.

² See the discussion in *Mabaso v Felix* 1981 (3) SA 865 (A); and see *Ntamo and others v Minister of Safety and Security* 2001 (1) SA 830 (T HC) paras 3 and 33) (upheld in *Minister of Safety and Security v Ntamo and others* 2003 (1) SA 547 (SCA)).

³ The amended plea differed from the draft set out in the notice of intention to amend, but the plaintiff elected nevertheless to proceed with the trial in order to avoid another postponement.

⁴ The plaintiff delivered a replication to the amended plea, and in argument the defendants' counsel criticized the replication for raising what she regarded as a new cause of action. Counsel for the plaintiff however disavowed reliance on any perceived new cause of action. It is thus not necessary to discuss the detail of the defendants' complaint in this respect.

⁵ My emphasis.

Sections 40 and 49 of the CPA

9. Sections 40 and 49 of the CPA are pivotal to the present matter.

10. Section 40, which provides for arrests without a warrant in a variety of circumstances, is relevant to the plaintiff's claim arising from the alleged unlawful arrest and detention. It reads, in relevant part, as follows:

“40 Arrest by peace officer without warrant

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

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

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1,⁶ other than the offence of escaping from lawful custody;

...

(j) who wilfully obstructs him in the execution of his duty;

...

(2) If a person may be arrested under any law without warrant and subject to conditions or the existence of circumstances set out in that law, any peace officer may without warrant arrest such person subject to such conditions or circumstances.”

11. Before the power to arrest in terms of section 40(1)(b) of the CPA may be exercised, certain jurisdictional factors must be present, namely:

11.1. The arrestor must be a peace officer;

11.2. The arrestor must entertain a suspicion;

11.3. It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 of the CPA; and

⁶ The offences referred to in Schedule 1 to the CPA are listed at the end of this judgment.

11.4. The suspicion must rest on reasonable grounds.⁷

12. In *Mabona and another v Minister of Law and Order and others*⁸ the Court held, in relation to the suspicion to be held under section 40(1)(b), as follows:

“The question is whether his suspicion was reasonable. The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

13. Section 49 of the CPA, in turn, must be considered in relation to the alleged unlawful shooting. It provides 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

⁷ All of the factors must be present: see *Minister of Safety and Security v Sekhoto and another* 2011 (5) SA 367 (SCA) para 6, referring to *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H.

⁸ 1988 (2) SA 654 (SE) at 658E-H. My emphasis.

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."

14. In *Ramasike v Minister of Police*⁹ the Court listed four factors that the Minister is required to prove to justify the conduct of his members:

"[24] The Minister is required to satisfy four aspects. Firstly, there must have been an attempt to arrest the suspect. Secondly, the suspect must have resisted the arrest, fled, or resisted and fled when it was clear to him that an attempt was being made to arrest him. Thirdly, it must have been impossible to arrest the suspect without force. Fourthly, once used, such force must be reasonably necessary and proportional to overcome the resistance or prevent the suspect from fleeing. In addition, 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.”

15. I turn to the facts against this background.

The pleadings and evidence

16. In his particulars of claim, repeated with some variations in his oral evidence, the plaintiff alleged that on the day in question he was driving his car at Botterboom Street, Delft when he was stopped by two members of the SAPS, one of whom was the second defendant, driving in a marked SAPS police bakkie. The second defendant confronted the plaintiff, and demanded immediate payment of the amount of R3 000 that the plaintiff owed him. The plaintiff did not have the money, but undertook to pay the second defendant in due course. The two policemen demanded that the plaintiff drive with them in the police bakkie to Gugulethu Police Station to sign an affidavit committing to pay. The plaintiff refused and suggested that they go to the nearby police station in Delft for that purpose.

17. When the second defendant refused, the plaintiff suggested that they go to his residence in Khayelitsha to get half of the money owed, but instead (so the particulars of claim state) the second defendant took out a firearm, and the plaintiff took off in his motor vehicle. In his oral evidence, the plaintiff was adamant that the second defendant did not, in fact, point a firearm at him.

18. The plaintiff then drove towards Mandalay, followed by the two police officers, when (according to the particulars of claim) the latter suddenly switched on a police siren whilst following him. In his oral evidence, the plaintiff persisted that the sirens were not sounding immediately after he had left Delft, but that they were only switched on some distance from Delft. Thereafter, other police vehicles joined the second defendant and his colleague in following the plaintiff. Shots were fired at the plaintiff which hit him on the left hip, whereafter the plaintiff lost control of his motor vehicle and hit a construction site in the area of Mitchell's Plain.

19. The second defendant came to the plaintiff's vehicle, pulled him out, started assaulting him and suggested to his colleague that they should "finish" the plaintiff off, but before the second defendant could do anything security guards from the close-by construction site arrived to inquire about the incident. The Lingelethu police arrived on the scene. According to the particulars of claim, the second defendant left with the marked police van and later returned, planting an imitation firearm on the back seat of the plaintiff's motor vehicle. In oral evidence the plaintiff stated that it was not the second defendant who had planted the firearm, but that he thought that it had been done by other SAPS members on the scene.
20. The plaintiff was assaulted at the scene by various SAPS members with open hands, fists, and booted feet, and was told that he was under arrest. The police took the plaintiff to Lentegour Hospital, where he was admitted and kept under police guard.
21. On Saturday, 11 February 2023, the plaintiff was discharged from hospital and subsequently taken by the members of the SAPS to Harare Police Station in Khayelitsha, where he was detained at the police holding cells. The plaintiff was taken to court on 19 February 2023 where the charge against him was withdrawn, and he was told to go home. He did not appear in court.
22. In their amended plea the defendants answered this narrative to the effect that, on 10 February 2023 at about 18:00 in the vicinity of Delft area, the second defendant together with his colleague were on duty in a marked police vehicle. The second defendant spotted the plaintiff driving his vehicle and followed him to a nearby house in Delft, where the second defendant alighted from his vehicle and approached the plaintiff who was sitting in the driver's seat of his vehicle.
23. A disagreement between the plaintiff and the second defendant (the latter confirmed in oral evidence that the plaintiff owed him money) occurred which resulted in the plaintiff pointing what appeared to be a firearm at the second defendant. The second defendant stepped back from the plaintiff's vehicle, and the plaintiff sped off.

24. The second defendant, believing that the plaintiff had pointed a firearm at him, returned to his vehicle and chased after the plaintiff. At the same time he called the police station for backup, reporting that the plaintiff had pointed a gun at pointed him. Other police vehicles, with sirens ringing, joined in the highspeed chase signalling for the plaintiff to stop his vehicle. The plaintiff refused to stop his vehicle and instead increased his speed. Even when gunshots were fired in the direction of the plaintiff's vehicle, he refused to stop. The chase continued and at or near Swartklip Road before the cemetery, the plaintiff lost control of his vehicle at a construction site. The plaintiff alighted from his vehicle with a gunshot wound on his upper thigh or hip. The second defendant, in the presence of the plaintiff and other police officials at the scene, searched the plaintiff's vehicle and found a toy gun inside his vehicle.
25. An ambulance arrived and the plaintiff was taken to Mitchell's Plain Hospital under police guard. His vehicle was impounded on the charge of possession of a firearm.
26. On Saturday, 11 February 2023, the plaintiff was discharged from hospital and detained at Harare Police Station, Khayelitsha.
27. The plaintiff's evidence established that he had been arrested and detained, and that he had been shot at by SAPS members. During his cross-examination, and in the course of argument, various discrepancies between his evidence and the allegations in his particulars of claim (as well as the warning statement he had made at SAPS) were pointed out to him. I have alluded to most of them already. They are, in particular, whether the second defendant had a firearm, whether he had been stopped by the police or whether the police followed him and approached him after he had stopped; whether the police had chased him; the issue of when the police sounded off their siren during the chase; that the J88 did not record injuries resulting from an assault in custody which the plaintiff testified about;¹⁰ and the issue of whether the toy firearm was planted in his vehicle, and if

¹⁰ The plaintiff's claim did not include damages arising from such alleged assault.

so, by whom.

28. These discrepancies are, however, not significant when considering the issues for determination as formulated by the parties in their joint minute. The particulars of claim do not constitute evidence, and – apart from certain factual details - the arrest, detention, and shooting are not in dispute. The evidence established, further, that the plaintiff's warning statement was written by a member of SAPS. It was never read back to him, and the plaintiff did not sign the part of the statement which confirms the correctness thereof.

29. Overall, the plaintiff's evidence was clear. He did not materially contradict himself on the witness stand, despite rigorous cross-examination. He made concessions where required. His demeanor was calm, and he answered all the questions, explaining the discrepancies, which appears to have occurred in the course of the drafting of the particulars of claim. His explanation was not so inherently improbable that it could be rejected out of hand.

The lawfulness of the plaintiff's arrest and detention

The arrest

30. As indicated, the defendants pleaded in paragraph 20 of their plea that the plaintiff's arrest without a warrant was justified under section 40(1)(b) because he was suspected of having committed a crime listed in Schedule 1 to the CPA. Such crime involved the pointing of what SAPS at the time believed to be a firearm, and seeking to defeat the ends of justice by trying to flee.

31. The second defendant testified that, when he first confronted the plaintiff, the plaintiff pointed at him with what he (the second defendant) thought was a firearm. He further testified that after the plaintiff had been shot at during the chase, a toy firearm was found during a search of the vehicle. The second defendant immediately proceeded to open a docket at the scene. The charge on the docket is stated as being "*possession of a firearm*".

32. It is common cause that a threat with a firearm or dangerous weapon as defined in section 1 of the Dangerous Weapons Act 15 of 2013 is included in Schedule 1 to the CPA. A “*dangerous weapon*” is defined to mean “*any object, other than a firearm, capable of causing or inflicting serious bodily harm, if it were used for an unlawful purpose.*”
33. The plaintiff denies having pointed anything at the second defendant, but I shall – for the moment - accept the second defendant’s evidence in this respect for the sake of the argument. What is pivotal is that the second defendant admitted that when he opened the docket he already knew that the firearm was not real. On the defendants’ version, SAPS realized that it was a toy upon its discovery in the vehicle. The charge indicated on the docket was therefore obviously wrong.
34. In other words, the second defendant had the opportunity to analyse and assess the information at his disposal at the scene. He had the opportunity to check what he had thought was a firearm. After realizing that the item which the plaintiff had pointed at him (if the second defendant’s evidence regarding the pointing is to be accepted) was not a firearm, he could at that stage no longer have entertained any suspicion that a firearm had been pointed at him. Constable Khupiso stated that he, too, that he became aware at the scene of the fact that the firearm was a toy.
35. A peace officer who fails to substantiate his suspicion when he is able to do so, does not act reasonably.¹¹ I agree with the submission by the plaintiff’s counsel that the information at the second defendant’s disposal could not have justified the plaintiff’s arrest for possession of a firearm. The suspicion was not based on solid grounds – quite the contrary. It therefore did not meet the test in *Mabona*, to which I have referred earlier. It follows that the plaintiff’s arrest did not meet all of the jurisdictional requirements set out in *Sekhoto* for an arrest lawfully to be effected under section 40(1)(b) of the CPA. On the facts, there could not be any reasonable suspicion of an offence referred to in Schedule 1 of the CPA having been committed.

¹¹ *Barnard v Minister of Police* [2019] 3 All SA 481 (ECG) para 35.

36. The plaintiff was, moreover, never charged with pointing at the second defendant with the toy firearm, or any firearm for that matter. The exhibit register was never presented to court to confirm that the alleged toy firearm was ever registered as an exhibit. The plaintiff was also not charged with defeating the ends of justice, or with reckless or negligent driving, or even driving above the speed limit.
37. It seems to me, in any event, that the contention that the plaintiff pointed an object at the second defendant which the latter thought was a firearm should not be accepted. The second defendant described what he thought was a firearm and stated that plaintiff did the pointing whilst seated in his vehicle. After seeing what he thought was a firearm, the second defendant immediately retreated to the police vehicle which was parked behind the plaintiff's vehicle. He called his colleagues on the radio and told them that he had been " *gunpointed*" by the plaintiff. Under cross-examination, when asked if he told the other police officers that he was in danger from the plaintiff, the second defendant said that he did not do so, but that the other police officers would have inferred the danger from the word "*gunpointed*".
38. The second defence witness, Constable Khupisho, however claimed he was the one who had radioed the other police officers, telling them what had happened. Constable Khupisho said that the police vehicle was parked behind the plaintiff's vehicle, and yet he (Constable Khupisho) could also see the firearm being pointed at the second defendant, to the extent that he was able to describe it. This is simply improbable.¹²

The detention

¹² See *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA) para 5. See also *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) para 15: "[15] ...There are before me two mutually destructive versions. The defendant must discharge the onus of proving that when his version is tested against the inherent improbabilities, the indisputable facts and the credibility of all the witnesses, I can conclude with conviction that it is more credible and probable and should be accepted, and that the other version is false. The defendant's version does not in my view pass the test. At best for him, there are probabilities and improbabilities either way, with no clear balance in the defendant's favour. If anything, I think the balance favours the plaintiff's version."

39. I turn to the plaintiff's detention. The second defendant did not follow up with the investigating officer about the developments in the case. After the plaintiff was arrested, the second defendant did not take the plaintiff to court, and was not aware that the plaintiff never appeared in court. He did, as at the hearing of the action, not know what had happened to the criminal case against the plaintiff. His attitude is hardly one expected of someone who arrested the plaintiff with the intention of taking him to court. In fact, during his evidence-in-chief the second defendant did not even testify about the plaintiff's arrest and detention. His reasons for arresting and detaining the plaintiff only came out in cross-examination, and did not include taking the plaintiff to court.

40. The defendants bore the burden to justify the deprivation of liberty, whatever form it may have taken. Once a plaintiff establishes that an interference has occurred, the burden falls upon the person causing the interference to establish a ground of justification:¹³

"[24] There is another, more important reason why this Court should rule in the applicant's favour. The Constitution¹⁴ enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.

*[25] This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba*, the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the *rei vindicatio* a useful analogy. The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases.*

¹³ *Zealand v Minister of Justice and Constitutional Development and another* 2008 (4) SA 458 (CC) paras 24-25. My emphasis.

¹⁴ See section 12(1)(a) of the Constitution.

This led that court to conclude that, since the common law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.”

41. The constitutional right entrenched in section 12(1)(a) of the Constitution requires not only that every encroachment on physical freedom be carried out in a procedurally fair manner, but also that it be substantively justified by acceptable reasons. The breach of this provision is sufficient to render the plaintiff's detention unlawful for the purposes of a delictual claim for damages. Thus, once it is clear that the detention is not justified by acceptable reasons and is without just cause in terms of section 12(1)(a) of the Constitution, the plaintiff's right not to be deprived of his freedom is established. This would render his detention unlawful.¹⁵ I have, in any event, found that the plaintiff's arrest was unlawful. The detention followed directly as a result of such unlawful arrest.

42. The purpose of an arrest is to take the suspect into custody to be brought before court as soon as possible on a criminal charge. Arrest is not an object in itself, but is merely an optional means of bringing a suspected criminal before court.¹⁶ The second defendant was the arresting officer. A consideration of his evidence reveals, however, that his purpose in arresting the plaintiff was not to take plaintiff to court.

43. In the defendants' amended plea,¹⁷ they “*put the plaintiff to the proof*” in respect of his allegations to the effect that the arrest and detention were wrongful and unlawful. This position is not correct - the plaintiff has no such duty. On a consideration of the salient evidence, I am of the view that the defendants failed to discharge the *onus* in respect of the plaintiff's arrest and detention.

The lawfulness of the shooting

¹⁵ *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) paras 25 and 27.

¹⁶ *Ex parte Minister of Safety and Security and others: In re S v Walters and another* 2002 (4) SA 613 (CC) para 49.

¹⁷ Para 19.

44. Section 12(1)(c) of the Constitution provides that everyone has the right to be free from all forms of violence from either public or private sources. The basis of the defendants' defence in relation to the alleged unlawful shooting as pleaded in their amended plea is section 49(1) and (2) of the CPA. The applicable law on section 49 is set out in *Govender v Minister of Safety and Security*¹⁸ and *Ex parte Minister of Safety and Security and others: In re S v Walters and another*.^{19 20}

45. The *onus* to establish the justification for the use of deadly force as contemplated in section 49 of the CPA in the course of a police officer carrying out such an arrest rests on the defendants. The kind of detail justifying the application of deadly force is peculiarly within the defendants' own knowledge, and only they can explain why they employed the degree of force in question.²¹

46. In *Walters*²² the Constitutional Court state the law regarding justification of use of lethal force in arresting suspects as follows:

"[54] In order to make perfectly clear what the law regarding this topic now is, I tabulate the main points:

- (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*

¹⁸ 2001 (4) SA 273 (SCA).

¹⁹ 2002 (4) SA 613 (CC).

²⁰ Both judgments were delivered before, and were responsible for, the amendment of section 49, and are instructive on how to interpret the section. The amendment redefined section 49 in the Criminal Procedure Amendment Bill GN 949 in GG 33619 of 7 October 2010, and was subsequently promulgated.

²¹ *Dyibishe v Minister of Police* [2023] ZAECHGHC 94 (5 October 2023) para 22, read with the content of fn 18 of that judgment.

²² *Supra* para 54. The footnotes are mine.

*necessary to carry out the arrest may be used.*²³

- (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 arrestor 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.*^{24 25}
- (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 arrestor 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.*²⁶
- (i) *These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person."*

47. Section 1 of the Firearms Control Act 60 of 2000 defines an "*imitation firearm*" to mean " *anything that has the appearance of a firearm but is not capable of operating as such and cannot by superficial examination be identified as an imitation.*"

48. Section 120(6)(b) of the Firearms Control Act provides *inter alia* that: "*It is an*

²³ See *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) paras 2, 5, 8, and 9, to the effect that this requirement is generally interpreted as meaning that whatever force used must have been the only viable alternative to guarantee a successful arrest. If any other means of carrying out the arrest was available to the arrestor, those means should have been exhausted. In addition, the arrestor must, before discharging a firearm at a suspect, issue a verbal warning followed by the discharge of a warning shot. In the event that this does not have the desired effect, the arrestor should direct a shot at the lower extremities of the suspect, rather than the rest of the body.

²⁴ See the discussion in *Matlau v Makhubedu* 1978 (1) SA 946 (A) to the effect that where a member who performs an official act is authorised by law to use force, he or she may use only the minimum of force which is reasonable in the circumstances.

²⁵ See also *Govender v Minister of Safety and Security supra* para 21, to the effect that the force should not only be proportional to the seriousness of the crime the suspect is thought to have committed, but also to the threat or danger the suspect poses to the arrestor, bystanders and society as a whole.

²⁶ See *Govender v Minister of Safety and Security supra* para 24, to the effect that for the use of force to be justified, an immediate threat of serious bodily harm to the arrestor or the public had to exist.

offence to point anything which is likely to lead a person to believe that it is a firearm, at any other person, without good reason to do so." Section 120(10)(b) provides that *"It is an offence to be in possession of any ... imitation firearm, with intent to commit an offence or to use the ... imitation firearm to resist arrest..."*

49. All of this is undisputed.²⁷

50. I have already indicated that I do not accept the defendants' evidence regarding the pointing of a gun at the second defendant at the time of their meeting at Delft. Even if, however, the defendants' version is accepted, the question remains whether those facts justified the use of lethal force against the plaintiff.²⁸ The firing of a shot at a suspect is potentially fatal, especially when, on the defendants' version, it occurred whilst everyone in question were driving at a high speed. The lawfulness of the act does not depend on the more or less fortuitous result thereof.²⁹ It therefore does not matter that the plaintiff was merely wounded, and not killed.

51. I have mentioned that the second defendant opened the docket at the scene of the shooting immediately after the shooting, and never charged the plaintiff with the pointing of a firearm (or a toy firearm). It is thus improbable that there had been such a threat of serious violence made, or any crime committed involving the infliction of serious bodily harm.

52. In argument the defendant's counsel placed emphasis on the fact that the plaintiff was injured in the hip, submitting that this indicates that the police officers in question tried to aim at the plaintiff's tyres. This is, however, speculation. The second defendant was adamant that he did not know why the unknown police officers shot the plaintiff, and stated in cross examination that he could not answer for them. Constable Khupisho could also not provide an explanation.

²⁷ Section 120(6)(b) and 120(10)(b) are not offences referred to in Schedule 1 to the CPA, and can therefore not be relied upon by the defendants under section 40(1)(b) of the CPA in relation to the plaintiff's arrest.

²⁸ *Ntamo and others v Minister of Safety and Security supra* paras 19-21.

²⁹ *Govender v Minister of Safety and Security supra* para 20.

53. The second defendant testified that he did not tell the other police officers who followed the plaintiff that he (the second defendant) was in any danger, and suggested that they must have assumed so because he told them at the beginning, when they started to chase the plaintiff, that a gun had been pointed at him. As indicated, however, Constable Khupisho subsequently testified that he was one who had made the call. He also did not tell anyone that they were in danger from the plaintiff.

54. There is another important aspect. According to the defendants' evidence, the shooting took place about 15 minutes after they had left their starting position at Delft. There is no indication that 15 minutes after leaving Delft the second defendant was still in any danger (assuming that some danger had existed at Delft) of being shot at by the plaintiff. SAPS fired four to five shots at the plaintiff while he was driving away. The shots were fired by police officers in a vehicle or one of the vehicles driving in front of the vehicle driven by the second defendant. There is no evidence of any warning shots having been fired. Constable Khupisho suggested that after they had left Delft, the plaintiff pointed the firearm at them as they were following him. This is not a sensible suggestion – why would the plaintiff point a toy firearm at two armed police officers chasing him while driving at high speed? In any event, the second defendant never testified about this alleged second pointing of a firearm or toy firearm.

55. Shooting multiple shots at the plaintiff at this juncture in these circumstances, even if he was fleeing and sirens were blazing from the outset as the defendants testified, was in my view not proportionate.

56. In the course of their cross-examination, the defence witnesses suggested that the plaintiff was driving recklessly, and was a danger to other road users. It was also suggested that he was driving above the speed limit of 60km per hour: Constable Khupisho testified that plaintiff was driving at between 60 and 80km per hour; the second defendant said he was driving at 100km per hour. This evidence does not assist the defendants' case, and reckless driving was in any event not pleaded as justification for the defendants' conduct (I have quoted paragraph 20 from the amended plea, which contains the pleaded grounds of

justification). It nevertheless raises the question whether police officers are allowed to shoot drivers who drive above the speed limit? If the shooting of the plaintiff was because of driving above the speed limit and driving recklessly, was the shooting proportional to the alleged contraventions of road traffic laws? I agree with the submission by the plaintiff's counsel that, even if the Court accepts that the plaintiff was driving above the speed limit, or driving recklessly (there is no evidence at which part of the chase this happened), the following *dictum* from *Ntamo and others v Minister of Safety and Security*³⁰ is apposite:

"[33] On the issue of the wrongfulness of resorting to lethal force, as opposed to some lesser form of force, a lot turns on the specific facts of each case and the person relying on private defence must proffer such facts as may justify the use of that force. No facts were placed before me explaining why the police did not shoot at the deceased's legs. There was no suggestion that shooting at the deceased's legs would not have neutralised him. Even if this was an emergency and the police had to act swiftly, they still could have shot at the legs and, for all we know, that might have yielded the desired result. In doing so, they could have used the exact same time they used in shooting at the torso. They have failed to explain why they did not do so. They have thus failed to justify their use of lethal force. Whilst appreciating that the life-threatening situation would in all probability affect one's calm and proper judgment and that, therefore, this should come into the equation, surely the boni mores by no means make light of the sanctity of life, and that includes the life of the aggressor. It can never be that any person who whips out a firearm and threateningly points it at the police apparently intent on shooting them is fair game to be shot and killed by the police. The police must justify their resorting to lethal force. In this regard examples of factors that may be relevant are the following:

- (i) the imminence of the danger;*
- (ii) how threatening the danger is to life or limb;*
- (iii) the nature of the instrument, if any, the attacker is using in waging the unlawful attack;*
- (iv) the proximity of the attacker and the attacked;*
- (v) the mobility of the attacker and the celerity of his/her movement; and*
- (vi) how easy or difficult it would be to apply force to a less delicate part of the body."*

57. As indicated earlier, the plaintiff was never charged with reckless and or negligent driving, or with driving above the speed limit. Did the police actually believe that he committed these offences; and were such offences the reason he was shot? Clearly not.

58. Any shortcomings in the defendants' evidence must be laid at their own door. After the close of both the defendants' and the plaintiff's respective cases, and in fact after the plaintiff's heads of argument had been delivered, the defendants applied to reopen their case. The applicable legal principles were set out in *Gamble Investments (Pty) Ltd v Santam Ltd and another*³¹ as follows:

"[5] Once a party has closed its case it will not generally be allowed to lead further evidence save in rebuttal. The court, however, has a discretion, to be exercised judicially, to allow a party to re-open its case and to lead such further evidence. Several considerations are to be weighed in the exercise of the discretion.

*[6] In **Mkwanazi v van der Merwe and Another** which dealt with the discretion to permit further evidence to be led in terms of Rule 28(11) of the Magistrates' Courts Rules, the court held that the Supreme Court (as the High Court was then named) has an inherent discretion to allow a party to re-open its case. Reference was made to **Oosthuizen v Stanley** where the following is stated:*

*'Several considerations have a bearing on the exercise of such discretion, for instance, the reason for the plaintiff's failure to call the witness before, the danger of prejudice to the opposite party owing to his being no longer able to bring back his witnesses, and, of course the materiality of the evidence. In an application for leave to lead fresh evidence in this court the test as to materiality laid down in *Colman v Dunbar* (1933 AD 141) is that the evidence tendered and such that it would be practically conclusive. In a trial court, however, in my judgment, the test of materiality should be held to be satisfied where the evidence tendered, if believed, is material and likely to be weighty.'*"

59. In the present matter, it appeared that from the affidavits delivered in support of the application that the defendants had left their investigation and trial preparation to the last minute.

³¹ [2020] ZAECPHC 9 (28 April 2020) paras 5-6.

60. They had been informed about the plaintiff's intention to institute action in June 2023 already, when the plaintiff's attorney sent a notice under section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. Summons was issued in November 2023, and the defendants delivered a plea during March 2024 (this plea was amended during January 2025) – presumably with the input of these officers, given their integral involvement in the events that occurred on 10 February 2023.³² The parties agreed on a joint practice note in January 2025, defining the issues for determination.

61. It must have been overwhelmingly clear throughout this process that the evidence of the police officers who had fired at the plaintiff would be required at the trial. Those officers were (when the action was instituted and even at the time of the hearing) still employed by SAPS, and they were thus readily available to the defendants. It does not matter that the plaintiff's particulars of claim alleged that the second defendant was one of the SAPS members who had shot at him – those allegations had been denied from the outset, even in the unamended plea. The plaintiff had the duty to begin at that stage, and the *onus* to prove that the shooting had taken place. The defendants must have been ready to rebut any such evidence, given the denial of the shooting in their plea. The *onus* later shifted because of the amendment to the defendants' plea.

62. There was no explanation on the papers as to why the evidence of these officers had not been procured timeously, except that the investigating officer in the matter had resigned in September 2024, and the docket could not be found. There is no explanation of the steps taken over the preceding months to locate the docket. In the course of the trial the second defendant testified expressly and repeatedly that he could not answer for the officers who had fired the shots. Even then, no postponement was sought to allow those officers to come to court to give evidence.

63. The overwhelming impression was that their evidence was sought to be introduced at that very late stage – before their own heads of argument were due

³² As counsel for the plaintiff put it, the plea could not have been a “thumbsuck”.

- to relieve the pinch of the shoe, and effectively to serve as rebuttal witnesses in relation to the plaintiff's evidence. In these circumstances, no proper case had been made out for the relief sought, and the application was dismissed, with costs, including counsel's fees taxed on Scale C.

64. In the present matter, therefore, there was no evidence to the effect that:

64.1. Any attempt was made to arrest the plaintiff, or to make him aware that he was under arrest, prior to the shooting. It is common cause that the shooters were unknown police officers who were not the arresting officers. They left the scene soon after the plaintiff was out of the vehicle he was driving. Their statements were never taken, and they did not testify during the hearing.

64.2. The police officers who shot at the plaintiff did so in order to arrest him.

64.3. The police officers who shot the plaintiff suspected that the plaintiff was a suspect as defined in section 49(1)(b), i.e., that they (and not the second defendant or Constable Khupisho) had a reasonable suspicion that the plaintiff was committing or had committed an offence. The Court is unable to determine if their actions were objectively reasonable at the time the plaintiff was shot.

64.4. The plaintiff posed an imminent threat of serious violence to the arrestor or any other person at the time he was driving away, which made it immediately necessary to use lethal force against him,³³ or that the plaintiff was suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm.

64.5. There were no other reasonable means of effecting the arrest, whether

³³

See *April v Minister of Safety and Security supra* paras 6-7. There is no version from which it could be inferred that the officers had reasonable grounds to believe that the shooting was immediately necessary to protect them from the plaintiff.

at that time or later.

65. The first defendant effectively has no reasonable explanation why the plaintiff was shot, even taking into account the evidence provided by the second defendant and Constable Khupisho, from which counsel argued could be inferred that the SAPS members who fired did so because they were trying to stop the plaintiff fleeing with a gun. Counsel for the defendants submitted further that it could reasonably be inferred from the objective facts that the plaintiff again committed the same crime that he had committed in Delft, and pointed his imitation firearm in the direction of the police officers who fired with the hope of preventing them from overtaking his vehicle and thereby blocking his way, as at that time it had dawned upon the plaintiff that he was in serious trouble. He did not want to be arrested and found in possession of the imitation firearm in his vehicle. I do not agree – drawing these inferences from the facts before the Court is a bridge too far.

66. In these circumstances, the requirements of section 49(2) have not been met.

Conclusion and costs

67. In all of these circumstances, I am of the view that the plaintiff has established his case, and that he is entitled to damages – in such *quantum* as may be proved in due course – on the bases set out in the particulars of claim in relation to the shooting, the unlawful arrest, and unlawful detention.

68. It was common cause that the second defendant had acted in the course and scope of his employment with SAPS at the time. In the premises, the first defendant is vicariously liable for damages arising from the second defendant's conduct.³⁴

69. There is no reason why the general rule as to costs should not be followed, that is, that costs should follow the result. In the exercise of my discretion, I am of the

³⁴ See the discussion in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

view that counsel's fees should be taxed on Scale C.

Order

70. In the circumstances, it is ordered that:

70.1. The plaintiff was wrongfully and unlawfully shot at, arrested, and detained by members of the South African Police Service on 10 February 2023.

70.2. The first defendant is liable to the plaintiff for such damages as may be proven in due course in relation each of the heads of damages (insofar as they relate to the unlawful shooting, arrest and detention) set out in paragraph 21 of the plaintiff's particulars of claim.

70.3. The first defendant shall pay the costs of the hearing on the merits, with counsel's fees to be taxed on Scale C.

P. S. VAN ZYL

Acting Judge of the High Court

Appearances:

For the plaintiff:

Mr S. X. Mapoma SC, instructed by Boto Molefe and Associates Inc.

For the defendants:

Ms L. X. Dzai, instructed by the State Attorney

OFFENCES LISTED IN SCHEDULE 1 OF THE CPA

1. *Treason*
2. *Sedition*
3. *Public violence*

4. Murder
5. Culpable homicide
6. Rape or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively
7. Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively
8. Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively
9. Trafficking in persons as provided for in section 4 and involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013
10. Bestiality as contemplated in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007
11. Robbery
12. Kidnapping
13. Childstealing
14. Assault-
 - (a) when a dangerous wound is inflicted;
 - (b) involving the infliction of grievous bodily harm; or
 - (c) where a person is threatened-
 - a. with grievous bodily harm; or
 - b. with a firearm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013 (Act 15 of 2013)
15. Arson
16. Malicious injury to property
17. Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence
18. Theft, whether under the common law or a statutory provision
19. Receiving stolen property knowing it to have been stolen
20. Fraud
21. Forgery or uttering a forged document knowing it to have been forged
22. Offences relating to the coinage
23. Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine
24. Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody
25. Offences referred to in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013
26. Offences referred to in Chapter 2 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act 33 of 2004)
27. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule