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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2018/1830

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
_____	_____
DATE	SIGNATURE

In the matter between: -

TINEI RAPHAEL CHINODAKUFA
SHOW MABVIREKARE
JOSEPH BUTOYI

First Plaintiff
Second Plaintiff
Third Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

Van Aswegen AJ

INTRODUCTION:

- [1] This case pertains to a shooting incident that took place on 25 September 2017, on Derby Road in Betrams.
- [2] The First and Second Plaintiffs were passengers in a Nissan Micra motor vehicle with registration GSD [...], at the relevant time being driven by the Third Plaintiff when they were shot and injured by members of the South African Police.
- [3] The Plaintiffs' claim is predicated on the allegation that the shooting of the First and Second Plaintiffs was unlawful. In the *alternative*, it is asserted that even if the shooting was justified, the police officers acted negligently.
- [4] The Plaintiffs contend that, as a consequence of the unlawful or, *alternatively*, negligent conduct of the police officers who discharged their firearms, they have suffered damages.
- [5] The First Plaintiff and Second Plaintiff each claim damages in the amounts of R954 500.00 and R754 700.00, respectively.
- [6] The Defendant in response alleged that its members shot at the Nissan Micra vehicle in order to cause it to stop and that it was not targeted at the Plaintiffs.
- [7] The SAP members raised as a defence justification and plead that they acted pursuant to section 49(2) of the Criminal Procedure Act, Act 51 of 1977, cited here in below:

“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.*

49 (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 122 of 1998 (wef 18 July 2003) and by s. 1 of Act 9 of 2012 (wef 25 September 2012).]

[8] It was argued that the shooting was reasonable and justifiable due to the alleged threat to the lives of the SAP members.

SEPARATION OF MERITS AND QUANTUM:

[9] The parties had agreed:

[9.1] to address liability and quantum separately.

[9.2] that the burden of establishing justification rested on the Defendant.

[10] This court is accordingly tasked solely with determining the issue of liability.

COMMON CAUSE FACTS:

[11] The Plaintiffs and the Defendant mutually agreed upon the following facts as being common cause:

- [11.1] The *locus standi* and the citation of the parties.
- [11.2] Vicarious liability of the Defendant for the acts and omissions of the members.
- [11.3] The First and Second Plaintiffs were rear end passengers in the Nissan Micra.
 - [10.3.1] The First Plaintiff was seated behind the driver and the Second Plaintiff behind the front passenger.
- [11.4] The shooting was preceded by an incident which:
 - [11.4.1] occurred around the corner at Sydney Street.
 - [11.4.2] was not seen by any of the SAPS members.
 - [11.4.3] involved a lady and a man squabbling – the latter was identified as “*Odar*”.
 - [11.4.3.1] Odar was sprayed in his face with pepper spray. He ran onto First Street, pursued by three women and two men.
 - [11.4.3.2] The incident led to individuals obstructing Sydney Street.
 - [11.4.3.3] The Nissan Micra passed the squabble and turned south onto First Street as the police vehicle approached from the north.
 - [11.4.3.4] Odar crossed First Street and got into the front passenger seat of the Nissan.
 - [11.4.3.5] The police vehicle stopped, and the police officers - Muhlari and Maponyane exited from the rear of the vehicle. Both police officers discharged their firearms, each firing two shots.

[11.4.3.6] After the shooting the Nissan Micra stopped just beyond the corner of the two streets at the lowest point in First Street.

[11.4.3.7] Muhlari, Maponyane, and two other crew members went to the Nissan Micra and discovered:

[11.4.3.7.1] The Plaintiffs had sustained gunshot injuries.

[11.4.3.7.2] No firearms were found in or around the Nissan Micra.

[11.4.3.8] Neither of the occupants of the Nissan Micra were acquainted with the runner, Odar, and no connection had been established between the runner and the occupants.

PLEA:

[12] In its Plea the Defendants plead and relied upon the following pertaining to the shooting incident:¹

“[3.1] On or about 25 September 2017 at around 21:05 the members of the South African Police Services ("SAPS") were patrolling along 1st Street when they noticed three African females and two African males chasing one African male while screaming for help.

[3.2] As the members of SAPS stopped and made a U-turn as they were travelling on the Northern direction.

[3.3] The members of SAPS saw the yellow Nissan Micra with registration letters and numbers GSD[...] driving on a high speed,

¹ 009-15 at Ad Paragraph 5

stopped and an African male who was being chased jumped into the yellow Nissan Micra.

- [3.4] The Members of the Defendant were travelling in a white marked SAPS motors vehicle with blue lights on and sirens tried to stop the yellow Nissan Micra, but it did not stop.*
- [3.5] At all material times the SAPS vehicle was clearly visible as it was marked and had its blue lights on.*
- [3.6] The members of the Defendant chased the yellow vehicle, but it was travelling on a high speed until the members of SAPS fired warning shots aiming at the tyres of the motor vehicle as a precautionary measure in order to caution the occupants in the yellow vehicle to stop.*
- [3.7] As a result, therefore the Members of the SAPS had a reasonable belief that the occupants travelling in the yellow vehicle were involved in the commission of the crime and reasonably believed that their lives were in danger under the circumstances.*
- [3.8] The members of SAPS acted within the ambits of Section 49 (2) of the Criminal Procedure Act 51 of 1977 in effecting arrest.*
- [3.9] The Defendant pleads that the fired shots were not targeted at the Plaintiffs but at the motor vehicle in order to stop it from fleeing in order to arrest the suspects.*
- [3.10] The shooting was reasonable and justified in the circumstances for preventing the suspects from fleeing and resisting arrest.*
- [3.11] The African male who jumped into the yellow vehicle was later identified as Oder after the yellow motor vehicle stopped.*
- [3.12] The Driver of the yellow vehicle was identified as Joseph Butoyi.*
- [3.13] Both Odar and Joseph were then arrested and detained at Jeppe Police.*

[3.14] *The Members of the SAPS in carrying out their duty acted reasonably under the prevailing circumstances at the time of shooting.”*

ISSUES IN DISPUTE

[13] The disputed issue is:

[13.1] Whether sergeants Muhlari and Maponyane were lawfully justified, under section 49 of the Criminal Procedure Act 77 of 1955, in discharging firearms at the Nissan Micra in which the Plaintiffs were travelling. More specifically it has to be determined whether or not the police officers:

[13.1.1] acted wrongfully and negligently by firing shots at the Nissan Micra in which the Plaintiffs were travelling and

[13.1.2] whether the SAPS members' lives were in danger or not and if there was an alternative way to protect themselves.

EVIDENCE LED BY THE DEFENDANT

[14] The Defendant's counsel led the evidence of two (2) witnesses, namely sergeants Muhlari and Maponyane.

SERGEANT MUHLARI

[15] Sergeant Muhlari stated that on *25 September 2017*, he was serving as a constable at Johannesburg Central SAP and was assigned to the Hillbrow area. He was assigned to a tactical response unit tasked with managing criminal activities in regions susceptible to hijacking and robberies. The team initiated patrol operations at 17:00 on the day.

[16] The crew was composed of Constable Mashaba (first crew member), Hlongwane (driver), and Maponyane (third crew member), with himself

serving as the fourth crew member. They were assigned a marked white Ford Everest police vehicle.

- [17] At 21:05, they were travelling northbound on First Street at a slow speed. The witnesses' attention was drawn to calls for help from nearby residences. They observed three females and two males pursuing one individual. During the pursuit, a vehicle stopped and the person being chased entered the car, which was identified as a yellow Nissan Micra.
- [18] After entering the Nissan, the Nissan Micra proceeded southwards in the opposite direction.
- [19] He and sergeant Maponyane exited the police vehicle to stop the speeding Nissan Micra.
- [20] The siren and blue lights identified them as police.
- [21] He shouted "*police, police*," but the vehicle did not stop.
- [22] He discharged a warning shot into the ground. The Nissan Micra continued without stopping.
- [23] One occupant pointed an unknown object, possibly a firearm. He then fired a second shot at the vehicle's tire.
- [24] The second shot was fired as the Nissan Micra drove up the street. He could not confirm if he hit the tire until the vehicle stopped.
- [25] He shot and he explained:
- "I would not wait to be shot at and act later. My life is in danger. I must now retaliate."*
- [26] The other crew members drove off and made a U-turn to follow the Nissan Micra.
- [27] The Nissan Micra came to a stop after travelling a short distance. Constable Mashaba and Hlongwane had already reached the vehicle, while he and sergeant Maponyane proceeded to approach it on foot.

- [28] Upon arrival, the vehicle doors were open, the front passenger was outside, another person was at the back - there were four people in total.
- [29] One of the passengers at the back was shot at in his back.
- [30] Constable Mashaba called the ambulance, then the police station.
- [31] A second individual reported being shot. They were transported by ambulance as additional police officers arrived.
- [32] He fired at the tyre to stop the Nissan Micra, intending to check for the pointed object. No object was found, though it might have been discarded.
- [33] No statement was taken from him at the police station. The evidence he gave was from memory.
- [34] Unaware of the reason for the pursuit or any crime, he fired a warning shot to halt the vehicle.
- [35] During cross-examination, it was put to him that when he fired the shot, he was unaware if a crime had occurred or what type of crime it might be. In response, he stated that he was aware a crime had taken place.
- [36] When then asked whether he had previously stated that he was unsure if:
- (i) a crime had been committed or
 - (ii) which specific crime had occurred, he responded:
- "The first question, I did not know."* This response pertains to his uncertainty about whether a crime was committed.
- [37] He testified that an individual in the backseat of the Nissan pointed an object, but he was unable to specify the direction in which the object was pointed or from which side it occurred.
- [38] During cross-examination, he stated for the first time that they had searched the area for the object. When questioned about why this was not included in his initial evidence, he responded that it had not occurred to him at the time. The location of the object was a significant factor and resulted in him firing a second shot.

- [39] He conceded that discharging a firearm at the vehicle, if not executed with precision, could result in fatal consequences.
- [40] Upon being questioned about his use of the term "*retaliation*," he affirmed this choice of word and explained that he perceived the object in question as a threat, believing it to be a firearm. Although he did not visually confirm the presence of a firearm, he was convinced in his mind that it was one.
- [41] When questioned about paragraph 3.6 of the Defendant's Plea², which claimed members chased the vehicle and fired warning shots at its tyres, he responded that before the police vehicle made a U-turn, he and Maponyane had already exited the police vehicle. It was suggested to him that the depiction of the police vehicle pursuing the Nissan contradicts his testimony in court.
- [42] No shots were discharged towards the police officers. He also does not know the reason why the Nissan stopped after the shooting.
- [43] It was also suggested to him that, at the time the man entered the Nissan, there was no certainty whether a crime had been committed. Similarly, when he fired the warning shot, it was not yet clear if any crime had taken place. The act of pointing an object did not present an immediate threat, yet a bullet was discharged. He did not take into account three factors:
- [42.1] the nature and extent of the crime;
 - [42.2] that the threat to the police officers was not real; and
 - [42.3] whether there was alternative means to stop the Nissan Micra.
- [44] He stated he did not intend to kill and only aimed at the tyre, as it was the sole way to stop the vehicle.
- [45] He observed the Nissan Micra when it was approximately two blocks from the police vehicle, a distance comparable to what he estimated to be that of a rugby field.
- [46] A one-minute interval lapsed between the warning shot and the subsequent round that he discharged

² 009-16

SERGEANT MAPHONYANE

- [47] The Defendant's second witness was Sergeant Maphonyane, stationed at Johannesburg Central SAP.
- [48] During September 2017 he was a constable and his work entailed crime prevention.
- [49] On 25 September 2017, he was performing his duties while travelling in a marked Ford Everest police vehicle equipped with a blue light and siren. The officers were conducting a patrol in the Jeppe area, which is known for incidents of hijacking and robbery. The police crew comprised of officers Hlongwane, who was driving, as well as Mashaba, Muhlari, and himself.
- [50] After 9:00 p.m., they conducted patrols along First Street, proceeding in a northbound direction.
- [51] He saw three females and two males pursuing a man. Calls for help were heard.
- [52] A Nissan Micra was rapidly approaching, and the individual being pursued entered the vehicle.
- [53] The police attempted to stop the Nissan Micra by signalling with their hands. The Nissan was travelling north to south, while the police vehicle was moving in the opposite direction, from south to north.
- [54] After attempting to stop the Nissan Micra he fired a warning shot in the road. He testified that one of the occupants then pointed something like a fire-arm. This person was seated at the right hand side at the rear of the Nissan Micra. He shot at the tyre of the Nissan Micra.
- [55] Due to low visibility and the late hour, his view was significantly impaired. Additionally, the interior of the vehicle lacked adequate lighting.
- [56] No shots were fired at them by the occupants of the Nissan.
- [57] The police vehicle made a U-turn and picked sergeant Muhlari and himself up.

- [58] The Nissan vehicle's doors were opened two people were seated at the back. The police asked them to alight to search them. One of the persons was injured.
- [59] A search was conducted for the object; however, no results were obtained.
- [60] He and sergeant Muhlari each fired twice, believing a crime may have occurred.
- [61] He fired a warning shot to stop the fleeing Nissan Micra, as there was no other way to halt the fast-moving vehicle.
- [62] The second shot was directed at the rear right tyre, as he believed that there was an imminent threat to their safety. There was an interval of one minute between the two shots he discharged. Subsequently, he however acknowledged that the shots were fired in relatively close succession.
- [63] The occupants of the Nissan Micra were likely injured due to First Street's curve and incline.
- [64] It is within a police officer's authority to stop a vehicle if there is reasonable suspicion of a crime, even in the absence of directly witnessing the commission of an offence.
- [65] The second shot was fired because an occupant pointed an object which he believed to be a firearm. He considered the possibility of being shot if he waited, particularly due to the risks associated with the Jeppe area.
- [66] Prior to the pursued individual entering the Nissan Micra and before the Nissan Micra passed the police vehicle, he and sergeant Muhlari exited the police vehicle.
- [67] He discharged a warning shot promptly as the Nissan Micra passed the police vehicle, demonstrating a swift response.
- [68] The second shot was triggered by a hand gesture inside the Nissan Micra as it passed the police vehicle. He was unaware of the events that transpired amongst the individuals in the Nissan. He was told that the occupants tried to remove the man from the vehicle, and there after gunshots were fired.

- [69] He and sergeant Muhlari were transported by the police vehicle to where the Nissan Micra was stopped. He refuted Muhlari's claim that they walked there.
- [70] When asked about the potentially lethal nature of shooting at the Nissan, he stated that his intention was not to target the vehicle itself but to shoot at the tyre. He also acknowledged the possibility of bullets ricocheting.
- [71] It was suggested that the second shot was discharged when there was no longer a threat to the police, as the vehicle had already passed, to which he replied "yes." When asked why the police did not pursue the Nissan Micra, which had a one litre engine, he stated that it depended on the driver. He added that the Nissan Micra was travelling at speed and the police vehicle had to execute an U-turn.
- [72] He stated that his use of a firearm was based on his assessment of the specific area as dangerous.
- [73] He was asked why the pointing of the object was not included in the Defendants' amended plea, given its significance as evidence. He indicated that he was unaware of the reason.
- [74] He admitted that the person being chased posed no threat as he was fleeing. When asked, he confirmed he used force. He fired his weapon as a result of the hand gesture, and was unaware of any crime at the time.
- [75] He asserted that his conduct complied with section 49 of the Criminal Procedure Act 51 of 1977. He discharged his firearm subsequent to the object being pointed. At the time the object was pointed, the Nissan Micra was approximately 5 to 6 metres away.
- [76] The windows of the Nissan Micra were shut. This evidence contradicts sergeant Muhlari's evidence which stated that the windows were open. The number of occupants inside the Nissan Micra was not visible.
- [77] The court asked if he was able to see inside the vehicle, to which he responded that it was not dark. Nevertheless, upon inquiry regarding the object, he stated that it was too dark to see.

CONTRADICTORY, IMPROBABLE AND CRUCIAL EVIDENCE OF SERGEANT MUHLARI

[78] The following contradictions emerged during cross-examination and in response to the court's questions from sergeant Muhlari's evidence:

[78.1] He gained awareness of the following:

[78.1.1] the Nissan when it was two blocks away – equating the distance to the length of a rugby field. Later on it was established that his measurement of the distance was inaccurate.

[78.2] He initially testified that he alighted from the police vehicle when he saw the runner (Odar) and subsequently stated that he alighted after the runner got into the Nissan Micra.

[78.3] He had a restricted amount of time to observe, as he was unable to specify the precise path taken by the runner. He acknowledged that his observation of the runner only began once the individual entered the Nissan Micra.

[78.4] He stated that his intention was to stop the Nissan Micra; however, he mentioned "*retaliation*" as a means to pre-empt any actions by the vehicle's occupants. *Retaliation* is a counter-attack, revenge or the action of harming someone because they have harmed you.³

[78.5] Although he acknowledged that visibility was limited due to darkness and some non-functioning streetlights, he maintained that he accurately observed the events. He specifically noted that the right rear window of the vehicle was open and reported seeing a pointing gesture inside the vehicle.

³ Oxford Dictionary.

- [78.6] His evidence regarding the pointing gesture lacked specific details. Additionally, the gesture was made after the Nissan Micra had passed the police vehicle.
- [78.7] He conceded that he did not know what happened inside the Nissan Micra.
- [78.8] He stated that there was a one-minute interval between the warning shot and the second shot he fired; however, this timing appears highly unlikely.
- [78.9] He stated that no crime occurred in his presence and there was no threat to the public. He testified that he considered the pointing gesture as a possible threat to himself and other police officers.
- [78.9.1] The pointing gesture involved a hand motion with no identifiable object indicated.
- [78.9.1.1] The pointing gesture, which was deemed significant and alleged to constitute a threat, was not included in the Defendant's amended Plea⁴ or documented in the police docket.⁵
- [78.9.1.2] Notably, the search for an object following the stopping of the Nissan was only disclosed by him when specifically asked if a search had occurred. It would have been reasonable to expect that he would present evidence regarding the search for the object voluntarily during his examination-in-chief. This is said in light of the fact that the hand gesture with the unidentifiable object led to the second shot being fired.

⁴ 009-14

⁵ 056-1

[78.9.1.3] The lack of any object found- no firearms were found in or near the Nissan Micra.

[78.10] He stated he fired the second shot in *retaliation* before the individuals in the Nissan Micra could respond. *Retaliation* is a counter-attack, however no shots were fired by the Plaintiffs.

[78.11] His acknowledgement that discharging a firearm in the direction of the Nissan posed a potential risk to life, as it is recognised that bullets can ricochet.

[78.12] He failed to consider other options alternative options or less intrusive methods for addressing the situation.

[78.13] His admission that the use of force, especially deadly force, was permissible only under highly specific and limited circumstances when making an arrest to prevent an actual threat is important.

[78.14] His failure to address the rationale behind deploying a police vehicle with a more powerful engine capable of pursuing the Nissan Micra independently, requesting additional support, or employing less intrusive methods remained unexplained.

CONTRADICTION, IMPROBABLE AND CRUCIAL EVIDENCE OF SERGEANT MAPONYANE

[79] He could not dispute that the runner moved in front of the Nissan after crossing the street, touched the bonnet, and entered through the front passenger door. This suggests he did not witness the manoeuvre and only noticed the runner upon entering the vehicle or that he was occupied whilst exiting the police vehicle.

[80] The Nissan Micra vehicle was approximately six metres from him when he observed a pointing gesture inside the vehicle; however, he was unable to articulate any specific reason for perceiving the object being pointed as a firearm.

- [81] Notably, he also estimated a one-minute interval between the warning shot and the subsequent shot. When presented with evidence suggesting that this estimate was inaccurate, he declined to revise his assessment. The stated interval of one minute is inconsistent with the brief duration in which the incident actually occurred.
- [82] His testimony that the Nissan Micra was travelling at a high speed both upon its initial approach and departure precludes the possibility of making a definitive observation regarding the nature and extent of the alleged hand gesture within the vehicle.
- [83] He was unable to point to any crime that occurred in his presence, nor was he able to specify any substantial threat to members of the public or clearly articulate the reason for the concern expressed by the police officers.
- [84] He acknowledged that discharging a firearm toward the Nissan Micra vehicle posed a potentially lethal risk and recognised the possibility of bullet ricochet.
- [85] He retaliated for the fear of anticipated violence rather than a projected threat being posed.
- [86] Referring to the attached Google Maps photographs⁶, he stated that the Nissan Micra came to a stop beyond the lowest point of First Street. This observation suggests that the Nissan Micra did not travel a significant distance after the individual entered the vehicle refuting the idea that the Nissan Micra was travelling at a high speed.
- [87] The identical accounts provided by sergeants Muhlari and Maponyane—specifically, a one-minute delay between the warning shot and the second shot, as well as the pointing hand gesture inside the Nissan Micra—raise suspicion.

PLAINTIFF'S EVIDENCE

⁶ 058-1

[88] The First Plaintiff was called to testify, as he is the individual associated with the hand gesture made inside the vehicle.

[89] The substance of his evidence was as follows:

[89.1] He spent the day in the company of the other two occupants at the residence of the Second Plaintiff.

[89.2] During the evening, they left the Second Plaintiff's home to buy fish at a nearby restaurant. The fish was sold out and they decided to return home.

[89.3] At the restaurant Joseph met a friend who was unknown to the First Plaintiff.

[89.4] Joseph offered the man a lift from the restaurant to the man's residence. The man sat in the front passenger seat and this seat remained unoccupied after he was dropped off.

[89.5] As they drove down Sydney Street, he witnessed an altercation between a man and a lady in the street which necessitated Joseph to stop, as he could not pass. There were a lot of people on the road.

[89.6] A lady, wearing a gown approached the man and sprayed him with what resembled pepper spray. This caused the man to turn around and run from the scene, into First Street while being chased by some of the people from First street.

[89.7] Joseph pulled away and turned right into First Street. He saw a police vehicle, with activated blue roof-lights approaching slowly in their direction, having crossed the river bridge approximately 100 m away from the Nissan.

[89.8] They were travelling at a low speed and as they passed the approaching police vehicle the runner crossed the street behind the passing police vehicle, entered directly in front of

the Nissan, looking at the occupants and holding on to the bonnet.

- [89.9] This necessitated Joseph to stop.
- [89.10] The runner rotated around the vehicle from the front to the side and grabbed the front left door and opened same.
- [89.11] The First Plaintiff attempted to lock the door and to eject the runner from the vehicle but failed.
- [89.12] He heard shots and felt that he was hit on the shoulder.
- [89.13] He alerted the Second Defendant telling him to duck down.
- [89.14] The vehicle moved forward and became stationary a distance down the street just beyond the corner of Sydney Street and well before the river bridge.
- [89.15] The First and Second Defendants were both hit, and the Second Defendant alighted from the moving vehicle before the vehicle finally stopped.
- [89.16] Police officers approached them at the stationary vehicle, and an ambulance was called.
- [89.17] The runner was arrested on the scene and Joseph was taken to the police station but sent home the same day.
- [89.18] Upon his discharge from the hospital, he was called to the police station to depose to a statement which is part of the bundle.⁷
- [89.19] The Second Defendant was hit in the spine.
- [89.20] The police members explained that they suspected a hijacking and therefore fired shots.

⁷ 053-88

[89.21] Neither of the Plaintiffs knew the runner and the occupants were surprised by his unauthorised action in entering the Nissan.

EVALUATION OF PLAINTIFF'S EVIDENCE:

[90] In the First Plaintiff's affidavit⁸ he depicted the happenings of the 25th of September 2017 - heritage day. He indicated that he, Joseph and Shaw was in the Nissan Micra driving from Betrams to Kensington. He stated that the man who fought with the lady run around the police car. The police car then made an U-turn to follow the man who hid around their Nissan Micra. The police opened fired (shooting at the man) but the bullet hit the First Plaintiff on the left shoulder. After being shot he told Show to get down as the police shot at them, but he was also shot at.

[91] The Defendant's counsel alerted the court to what she termed the following material contradictions:

[91.1] The First Plaintiff's affidavit mentioned about five people in the road⁹, but in his testimony, he referred to a group of people.

[91.2] The Plaintiff stated in court that he, Show, and Joseph (the driver) were in the car when they went to a restaurant. He later testified that a friend of Joseph joined them in the front seat as a passenger when leaving. However, in his initial statement, the Plaintiff only mentioned three people in the car and did not specify the seating arrangement or mention Joseph's friend.

[91.3] In his statement, the First Plaintiff reported seeing a marked police car patrolling as a man who had been fighting with a woman ran past it. The police made a U-turn to pursue him; when he attempted to hide near the car, officers fired at him. Whilst in evidence in chief, the First Plaintiff testified that the first shots were fired at him and Show.

⁸ 053-88 – exhibit A

⁹ Paragraph 2 at 053-88

[92] A contradiction is a combination of statements which are inconsistent or opposed to one another.¹⁰

[93] The First Plaintiff's observation of people on the road in his testimony as opposed to his affidavit is not seen as a contradiction. The witness was not asked to clarify what he considered a group; a group can reasonably also refer to approximately five individuals.

[94] At the time of the altercation, only three people—the First Plaintiff, Joseph, and Show—were in the Nissan Micra. Although the presence of Joseph's friend was not mentioned in his affidavit, it is clear that the affidavit commences at the time when he witness the lady fighting a man and excludes the events prior to this. His testimony of the events prior to witnessing the altercation aligns with the Plaintiff's attorney's account in the Notice of Intention to Institute Legal Proceedings under section 3 of Act 40 of 2002, dated 2 November 2017.¹¹ It stated that:

“3. Our clients were returning from a restaurant and driving on Derby Road in Betrams.

4. Tinei and Show were seated at the rear passenger seat. The front passenger seat was occupied by a friend of Joseph who was dropped off earlier at this residence...”

[95] Consequently, the aforementioned statements do not constitute contradictions that undermined the credibility of the First Plaintiff.

[96] The Defendant's Counsel indicated that the First Plaintiff was a single witness and that the cautionary rule should be applied.

[97] In *S v Ganiel*, 1967 (4) SA 203 (N) Leon and Harcourt JJ at page 206 G-H stated the following with regard to evidence of a single:

“The cases dealing with single witnesses do not, as we understand them, lay down any rule of law but merely indicate that a court should approach the

¹⁰ Oxford Dictionary

¹¹ 053-12

evidence the evidence of a single witness with caution and should not easily convict upon such evidence unless it is substantially satisfactory in all material respects or unless it is corroborated. "

- [98] The Appellate Court in *S v Webber*¹ 1971 (3) SA 754 (A) at 758G-H), after examining the case law, concluded as follows (per Rumpff JA:

"Dis natuurlik onmoontlik om 'n formule te skep waarvolgens elke enkele getuie se geloofwaardigheid vasgestel kan word, maar dit is noodsaaklik om met versigtigheid die getuienis van 'n enkele getuie te benader en om die goeie eienskappe van so 'n getuie te oorweeg tesame met al die faktore wat aan die geloofwaardigheid van die getuie kan afdoen."

- [99] The First Plaintiff's evidence was assessed with caution, the "contradictions" referred to by the Defendant are not seen as contradictions as discussed here in above. The First Plaintiff's evidence was direct and satisfactory. His evidence cannot be found to be dishonest, untrustworthy and is accordingly accepted.

JUSTIFICATION:

- [100] The Defendant had to establish and prove justification under section 49 of the Criminal Procedure Act, Act 51 of 1977.

- [101] In the application of section 49, it was incumbent upon the Defendant to establish and prove that:

[101.1] The Plaintiffs or the individual fleeing must have been considered *suspects*; there should have been reasonable grounds to suspect that a crime was being committed or had been committed.

[101.2] *Attempts had to be made to arrest* the suspect/s;

[101.3] The suspect/s had *resisted arrest*;

[101.4] *A clear attempt* had been made to arrest.

[101.5] The suspect/s could not have been arrested *without the use of force*;

[101.6] *Force was used to effect the arrest*;

[101.7] The force was *reasonably necessary and proportional* in the circumstances to overcome the resistance or to prevent the suspect from fleeing.

[101.8] If the force was *deadly* whether:

[101.8.1] the suspect *posed a threat of serious violence* to the arrestor or any other person; or

[101.8.2] 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.

[102] Neither of the police officers could testify:

[102.1] whether Odar or the Plaintiffs had committed a crime or whether the officers had a reasonable suspicion that they had committed a crime.

[102.1.1] Based on the evidence, neither Odar nor the Nissan's occupants could reasonably be considered suspects at the time in that:

[102.1.1.1] the members were not privy to the incident in Sydney Street.

[102.1.1.2] their attention was likely drawn by one or more of the following: observing Odar, the chasers, hearing the shouting, or witnessing the interaction between the runner and the Nissan vehicle.

[102.1.2] The officers' alert must be evaluated using objective facts about the cause and suspicion of a crime. The reason for the chase and the events on Sydney Street were unclear, and assumptions made after the fact do

not satisfy the reasonable and objective test that Odar committed a crime.

- [102.1.3] Odar's pursuit and the shouting did not clearly indicate a crime or identify the individuals involved.
- [102.1.4] The Defendant's witnesses acknowledged that they were unable to identify any crime or determine what offence may have been involved. Additionally, their subsequent speculation regarding a possible hijacking supports the conclusion that attempts to stop the vehicle were not conducted in accordance with section 40 of the Act. Section 40 provides for different instances where peace officers may effect an arrest without an arrest warrant.
- [102.1.5] The interaction between Odar and the vehicle was short and occurred quickly.
- [102.1.6] The officers exited their vehicle immediately but had no objective reason to suspect the runner of any crime.
- [102.1.7] The runner was not escaping arrest, and the pursuit may have had any cause. Assuming a crime in this context lacks logical basis.
- [102.1.8] The unchallenged testimony of the First Plaintiff established that neither occupant of the vehicle was acquainted with the runner. The surprise exhibited by both police officers during cross-examination, when this information was presented, indicates that they had not previously considered this matter.
- [102.1.9] At the relevant time, it was not reasonable for the police officers to hold any suspicion regarding the runner, and consequently, no suspicion could be attributed to the occupants of the Nissan either.

[102.1.10] The police officers' response was disproportionate. The evidence they provided appears to have been reconstructed, and possibly altered, to substantiate a suspicion that could not have been reasonably justified at that time.

[102.2] that *any efforts* were made to arrest or detain Odar or the Plaintiffs.

[102.2.1] The evidence indicates that any attempts made to arrest was unlikely.

[102.2.1.2] It can be stated that, if any attempts were made, they were indirect, unclear, and open to multiple interpretations.

[102.2.1.3] There is no reason to dismiss the evidence of the First Plaintiff that the blue roof lights of the police vehicle were already engaged when he first saw the vehicle.

[102.2.1.4] There is a clear inconsistency in the police evidence regarding both the efforts undertaken and the chronological order of the arrest attempts.

[102.2.1.5] Although the roof lights and siren were activated during the incident, it is unlikely that this would have reasonably influenced the driver to remain stationary, given the very brief time between the police officers' responses and the shooting.

[102.2.1.6] Whether gestures were made inside or outside of the vehicle, these attempts

may not have been readily apparent, unambiguous, or clearly visible.

[102.2.1.7] The incident occurred quickly on a dark street, providing limited opportunity for observation, especially with regard to detailed observation.

[102.2.1.8] The uncontested evidence demonstrates that the occupants of the Nissan were taken by surprise when the runner entered the vehicle. Shots were discharged in rapid succession, and it is likely that the driver attempted to prevent the runner's entry by driving away.

[102.2.1.9] A complete and exact reconstruction of the timing and sequence of events is not feasible. In the context of the time, the use of flashing blue lights, a siren, or any other signals by the police members would not have clearly communicated or attempted to arrest the driver or occupants of the vehicle.

[102.2.1.10] Officers should not expect immediate compliance from those who see blue lights and hear sirens; the presumption of innocence must be respected.

[102.2.2.11] The claim of resistance appears to have been constructed after the fact and is not reasonably substantiated by the balance of probabilities in light of the overall evidence.

[102.3] that the arrest of Odar and the Plaintiffs could not have been affected without the application of force.

[102.4] that the force was used to effect an arrest;

[102.4.1] The evidence led confirmed that the police officers did not considered alternatives to arrest in that:

[102.4.1.1] The officers responded promptly, exhibiting a reaction that appeared highly procedural and potentially exceeded standard expectations, without evident consideration of alternative courses of action.

[102.4.1.2] The evidence indicated anticipation and retaliation to prevent a response from the Nissan's runner or occupants.

[102.4.1.3] Neither of the police officers considered the significant differences in the engine size between the vehicles, nor the potential to pursue the Nissan and to request additional support.

[102.4.1.4] The officers' claim that no alternative means were available is not substantiated by the facts, and therefore the section 49 justification is not met.

[102.5] that the use of force was both reasonably necessary and proportionate under the circumstances to overcome resistance or prevent the suspect from fleeing.

[102.5.1] The evidence presented substantiated the following findings:

[102.5.1.1] The force had the potential to cause death.

[102.5.1.2] Lethal force is justified only by the perceived threat from the hand gesture in the Nissan Micra.

[102.5.1.3] The police officers' response was disproportionate to their perception, as there was no apparent threat or attack to them or the public.

[102.5.1.4] If such a threat had truly existed, it would have been reasonable to expect that any shots fired were intended for purposes of self-defence rather than being directed at the tires of the Nissan, as claimed by the officers.

[102.5.1.5] The officer's account appears to be a reconstruction to explain the use of deadly force. The available information regarding the hand gesture - its nature, extent, consequence, or result - does not provide sufficient context to support the decision to use deadly force.

[103] The police officers admitted uncertainty about whether a crime had occurred, so Odar and the Plaintiffs could not have been considered suspects. The police officers appeared to act on unfounded assumptions without all the facts. Their claim that they shot because they believed the vehicle was hijacked does not match their initial observation of Oder being chased.

[104] Neither police officers provided a clear explanation of the threat, why no proper search was conducted inside or near the Nissan Micra for the object, or why these issues were absent from statements on the incident and the Defendant's plea, despite disclosure to the legal team.

- [105] The time and opportunity available for observation were highly restricted, and inconsistencies regarding the open window—specifically whether the hand gesture was witnessed through the side or right rear window, as well as whether an object was involved in the hand gesture—are self-evident.
- [106] The rationale for employing force, particularly lethal force, is based solely on the purported hand gesture observed within the Nissan Micra. Both witnesses acknowledged having limited time and opportunity to accurately perceive the events inside the vehicle.
- [107] Furthermore, neither of the police officers possessed knowledge of the events that transpired inside the Nissan Micra.
- [108] Neither police officers believed that the runner's entry into the Nissan was unauthorised, and no actual threat subsequently occurred. It is unclear how an attack could have taken place from within the vehicle while the windows were closed.
- [109] Credibility is undermined by major inconsistencies among the police officers regarding attempts to stop the Nissan Micra, whether the rear window was open, and how they approached the vehicle.
- [110] The evidence shows exaggeration and indicates that both police officers had limited time to observe the incident. Their response was immediate, and their estimates regarding the Nissan Micra's speed and stopping distance were highly exaggerated and speculative due to minimal opportunity for observation.
- [111] Furthermore, it is not clear what each of the police officers actually observed, nor which details are based on reconstruction rather than direct observation.
- [112] The facts do not align with those typically observed in a hijacking scenario, and the allegation appears to lack substantial foundation. The pursuit may have resulted from various factors and does not indicate that a prior crime had occurred.

- [113] The evidence indicates that the runner most likely crossed behind the police vehicle, as none of the officers observed the runner crossing in front of the Nissan Micra; their accounts only noted his entry into the Nissan Micra.
- [114] The police vehicle had already passed the Nissan Micra before the shots were fired, which happened after the runner entered the vehicle.
- [115] It is immaterial whether the shots were discharged prior to or following the vehicle's departure.
- [116] The shots followed in close succession of the runner entering the Nissan Micra. The shots were fired from behind the Nissan Micra.
- [117] The use of terms such as "*retaliation*" by the police officers indicates that their response was a counterattack where it is clear that there was no attack by the occupants of the Nissan Micra. The police officers' actions were not only disproportionate but they were operating under a heightened state of alert not warranted by the circumstances.
- [118] I am mindful of Chapter 11 of the Constitution of the Republic of South Africa 1996 ("the Constitution") which stipulates that the South African Police Services has a responsibility to:
- [118.1] Prevent, combat and investigate crime;
 - [118.2] Maintain public order;
 - [118.3] Protect and secure the inhabitants of the Republic and their property;
 - [118.4] To uphold and enforce the law;
 - [118.5] Create a safe and secure environment for all people in South Africa.
- [119] However, a person fleeing from the police has not yet been convicted of an offence. There is a presumption of innocence.
- [120] In *Govender v Minister of Safety and Security 2001 (4) SA 273 (SCA)* at paragraph 21 the following was stated:

[21]: Giving effect to section 49 (1) of the Act, and in applying the constitutional standard of reasonableness the existing (and narrow) test of proportionality between the seriousness of the relevant offence and the force used should be expanded to include a consideration of proportionality between the nature and degree of the force used and the threat posed by the fugitive to the safety and security of the police officers, other individuals and society as a whole.

In licensing only such force, necessary to overcome resistance or prevent flight, as is 'reasonable', section 49 (1) implies that in certain circumstances the use of force necessary for the objects stated will nevertheless, be unreasonable.

It is the requirement of reasonableness that now requires interpretation in the light of constitutional values. Conduct unreasonable in the light of the Constitution can never be 'reasonably necessary' to achieve a statutory purpose (my underlining)

[121] It is evident that the force utilised must be necessary to overcome resistance or flight and reasonable.

[122] In the matter before me the police officers did not know whether a crime had been committed, the Nissan Micra had already passed the police vehicle, the officers retaliated on the basis of a hand gesture with an identifiable object inside the Nissan Micra, did not consider alternatives to the shooting and despite the vehicle being stopped they further did not pursue arrests of the Plaintiffs. The pointing of the object perceived to be a firearm inside the vehicle occurred after the Nissan Micra passed the police vehicle, where the police officers' visibility was clearly affected and in the absence of evidence that there was such an object in the Nissan Micra. The police officers' testimonies that the first and second shots were fired with an interval of one minute also does not align with the remainder of their evidence. If there was indeed an one minute

interval between the shots the Nissan Micra would have been further than 6 metres from the officers and visibility inside the Nissan in a dark area would have been obscured.

[123] The law regarding the use of force during an arrest was clarified by the Constitutional Court in *Ex Parte Minister of Safety and Security and Others: In Re S v Walters & Another* 2002 (4) SA 613 at paragraph 54 where it was held that:

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

[123.1] The purpose of arrest is to bring before court for trial persons suspected of having committed offences.

[123.2] Arrest is not the only means of achieving this purpose, nor always the best.

[123.3] Arrest may never be used to punish a suspect.

[123.4] Where arrest is called for, force may be used only where it is necessary to carry out the arrest.

[123.5] Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used

[123.6] In deciding what degree of force is both reasonable and necessary, all the circumstances must be considered, 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.

[123.7] Shooting a suspect solely to carry out an arrest is permitted in very limited circumstances only.

[123.8] 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.

[123.9] 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."

[124] Section 49 of Act 51 of 1977 was dealt with in *April v Minister of Safety and security All SA 270 (SE)* where it was held that:

"In order to discharge the onus resting upon him, the defendant must not only prove that the police suspected on reasonable grounds that the plaintiff was part of a conspiracy to rob the cash in transit vehicle. This would justify the arrest.

He must also satisfy the requirements laid down in section 49(2).

There must be acceptable evidence that the police believed on reasonable

grounds that the use of the R5 rifle and the 9mm pistol to prevent the plaintiff from fleeing or resisting - the only justification raise in the plea - was immediately necessary for their protection or the protection of any other persons; that there was a substantial risk that the plaintiff would cause imminent or future death or grievous bodily harm if the arrest was delayed;

or that the offence in question was in progress and was of a forceable nature involving the use of life threatening violence or a strong likelihood that it would cause grievous bodily harm (Govender v Minister of Safety & Security 2001(2) SACR 197 (SCA)).

My view is that even on an acceptance of the police's version of the facts the evidence falls short of meeting the statutory requirements for the use of deadly force.

"In the First place, the provisions of section 49(2)(a) were not satisfied. This subsection required proof of a belief on reasonable grounds by Makaula or Frank that, at the time they opened fire after the plaintiff alighted from the Golf and ran from the scene, the use of firearms was immediately necessary for the protection of the police or any other person.

There is no suggestion here of the protection of any person other than the police.

We know that the plaintiff was not armed. Neither of the policemen who fired shots saw or thought they saw a firearm in his possession. They said that they did not see his hands at all. They did not testify to any threatening gesture on his part at that stage which might have led them to a reasonable belief that he might have a concealed firearm and that he might open fire with it.

Makaula's case was that somebody in the plaintiff's Golf had previously fired shots at the Jetta through the front passenger window of the Golf. This was before the vehicles had entered Main Street. On his version it could not have been the plaintiff because he was the driver. There were no firearms found in the Golf afterwards..." (my underling)

[125] The police officers in the matter before court were unaware of why the chase began or what happened at Sydney Street. Any assumptions made after the fact, even if confirmed, do not meet the reasonable and objective standard required to prove that the runner (Odar) had committed a crime. Neither the act of chasing nor the shouting could objectively determine whether a crime took place, who the alleged offenders were, or who might have been a victim.

[126] The runner's interaction with the vehicle was rushed and swift.

- [127] The officers exited the police vehicle immediately. Objectively, there was no basis for any suspicion that the runner was involved in criminal activity.
- [128] The runner (Odar) was not evading law enforcement (arrest), and there is no evidence to suggest that the pursuit was provoked by criminal activity. Inferring the existence of a crime under these conditions is unsupported by logical analysis.
- [129] If the runner could not be connected to a crime, similarly also the occupants of the Nissan could not have been tied to any crime.
- [130] No attempts were made by the police officers to arrest any person.
- [131] No alternatives to shooting were furthermore considered.
- [132] The force used was lethal, exaggerated and based upon a hand gesture with an unidentifiable object in the Nissan Micra.
- [133] If the officers' actions were motivated by genuine fear, it would be anticipated that they would respond with self-defensive measures rather than discharging their firearms at the vehicle's tyres.
- [134] The argument that section 49 justifies the attempted arrest and any resistance is not supported by the facts, especially considering how quickly events unfolded and the surprise and reactions of those in the Nissan Micra.
- [135] There is furthermore no evidence to support the allegation that shooting was the only option available. It is very clear that other alternatives were not considered at all.
- [136] There is a clear absence of proportionality between what the police officers perceived – the hand gesture inside the Nissan Micra under low visibility and their ultimate reaction of shooting.
- [137] The Nissan Micra had furthermore passed the police vehicle allowing for the police officers, in circumstances of retaliation, to have sought

protection behind the police vehicle. Retaliation is a counter-attack based upon an attack which is not supported by the facts.

[138] I conclude that the shooting was therefore unlawful.

CONCLUSION:

[139] Based upon the evidence led in court by sergeants Muhlari and Maponyane the Defendant did not discharge the onus that rested on it in justifying the shooting by the members of the police force.

[140] There is clearly an absence of an attempted arrest and of any resistance. The incident occurred in a dark street with only sum of the streetlights working, it furthermore occurrent in a short time span with limited time for observation.

[141] Whilst the Defendant argued that Rule 18(4) of the Uniform Rules of Court prohibits the pleading of evidence, it is evident from the Defendant's Amended Plea at paragraph [12] that the Defendant did indeed plead evidence. The fact that the hand gesture inside the Nissan Micra was not mentioned, despite other evidence being included, is notable given its importance.

[142] The police fired in response to a hand gesture with an object perceived to be a firearm. If their account is accurate, a one-minute delay would have allowed the Nissan Micra to move out of clear view due to low visibility and distance. The police officers viewing of a hand gesture inside the Nissan Micra would have been improbable.

[143] The police officers also did not consider alternatives to shooting, and their response was disproportionate to the hand gesture observed.

[144] No attack originated from within the Nissan Micra, nor were any firearms discovered in or around the vehicle. Retaliation by the police officers was therefore not an appropriate course of action.

[145] The nature and the extent of the hand gesture remain unexplained. This is highly significant.

[146] I conclude that:

[146.1] The Defendant did not discharge its onus of proof.

[146.2] The shooting was unlawful and that there was no justification in terms of section 49 of Act 51 of 1977.

[147] The Defendant is liable for the damages to be proven which arose from the shooting incident.

[148] Accordingly, I make the following order:

Order

[1] The Defendant is liable for all the damages to be proven which resulted from the shooting incident together with costs of the action on the High Court scale including the costs of counsel on scale B.

S VAN ASWEGEN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Hearing date: 8 September 2025

Delivery date: 13 October 2025

For the Plaintiffs:

Adv P Uys
Instructed by Logan Naidoo Attorney

For the Defendant

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