



**THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Reportable/Not Reportable

Case no: CA & R 63/2024

In the matter between:

SIPHIWE MATHEWS MBANGA

Appellant

and

THE MINISTER OF POLICE

Respondent

Neutral citation: *Mbanga v The Minister of Police* (CA & R 63/2024) 30 April 2026.

Coram: Stanton J *et* Groenewaldt AJ.

Heard: 16 February 2026.

Delivered: 30 April 2026.

Summary: *Appeal against dismissal of appellant's claim for damages arising from his shooting by a member of the South African Police Service – Whether the trial court erred in finding that the appellant bore the onus to prove that the South African Police Service member unlawfully shot him; and that the police officers failed to comply with their statutory duty as set out in s 49(2) of the Criminal Procedure Act 51 of 1977 – Whether the force was not reasonably necessary and proportional to the alleged threat posed by the appellant in the circumstances – Appeal upheld.*

ORDER

1. The appeal is upheld with costs on a party and party scale B as set out in Rule 69(7), read with Rule 67A(3) of the Uniform Rules of Court.
2. The order of the Regional Court, Kimberley, is set aside and replaced with the following:
 - “1. The defendant shall be liable for 100% of the plaintiff’s proven damages arising out of the injuries the plaintiff sustained when he was shot by the police on 08 April 2017.
 2. The defendant shall pay the plaintiff’s costs of suit.
 3. The quantification of the above damages is postponed *sine die*.”

JUDGMENT

Stanton J

Introduction:

- [1] This is an appeal against the judgment of the court a quo dismissing the appellant’s claim for damages resulting from an undisputed shooting incident (“the shooting incident”) that occurred on 08 April 2017 when the appellant was shot by a member of the South African Police Service (“the SAPS”).
- [2] In his plea, the respondent admitted that the members of the SAPS discharged shots in the direction of the appellant, but that it was done in defence of another

SAPS member's life, which member was attacked by the appellant with a dangerous weapon or a purported dangerous weapon; and that the use of force was necessary and reasonable in the circumstances.

- [3] The only issue for determination in the court *a quo* was whether the shooting was justified under s 49(2) of the Criminal Procedure Act¹ ("the Act").

Use of force during arrest: Section 49 of the Act

- [4] Section 49 of the Act regulates the force that the police may employ to arrest suspects who offer resistance or flee. It reads:

'49 Use of force in effecting arrest

- (1) For the purposes of this section—
 - (a) **'arrestor'** means any person authorised under this Act to arrest or to assist in arresting a suspect;
 - (b) **'suspect'** means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and
 - (c) **'deadly force'** means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.
- (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if—
 - (a) the suspect poses a threat of serious violence to the arrestor or any other person; or
 - (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm

¹ 51 of 1977.

and there are no other reasonable means of effecting the arrest, whether at that time or later.’

- [5] It is apparent from the foregoing that section 49 of the Act sets out several requirements for the successful invocation of the statutory defence of justifiable use of force, including “*deadly force*”, in arrests. The section outlines requirements for a successful reliance on the said statutory defence in respect of both use of “non-deadly force” and then adds others for the use of “deadly force”, the latter being statutorily defined. It is so that for the use of non-deadly force, the person using the force must be an “arrestor” within the meaning of s 49(1); the person against whom the force is used must be a “suspect” as defined in sub-s (1); the force used must not be “deadly force”, which is defined in sub-s (1); the use of force must arise during or after an attempt by the arrestor to arrest the suspect; it must be clear to the suspect that an attempt to arrest him or her is being made; the suspect must resist the attempt, or flee, or resist the attempt *and* flee; the suspect cannot be arrested without the use of force: the force must then be *necessary* for the arrest to take place; in order to effect the arrest, the arrestor may use ‘such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing’.²
- [6] It is so that “in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances”, the arrestor may use “*deadly force*” (as defined above) only if either of these two conditions is met: (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.³

² See Du Toit: *Commentary on the Criminal Procedure Act*; RS 65, 2020 ch5-p27-28; see also J Burchell, PJ Schwikkard and TB Mosaka, *Burchell's Principles of Criminal Law*, 6th edition (2025) at 141.

³ *Ibid.*

- [7] Section 49 of the Act engages matters of acute sensitivity, considerable public importance, and clear constitutional significance. This Court is mindful of the dangers that police officers routinely confront in the execution of their duties, which are often performed under conditions of urgency and considerable risk.⁴ In such circumstances, officers are required to make decisions that are both immediate and consequential. Judicial scrutiny of those decisions must therefore guard against the distorting effects of hindsight, as courts have consistently cautioned against evaluating conduct from the comfort of an armchair when it was undertaken in rapidly evolving and hazardous situations.⁵ At the same time, it must be emphasised that SAPS bears a constitutional mandate to prevent, combat, and investigate crime; to maintain public order; to protect and secure the inhabitants of the Republic and their property; and to uphold and enforce the law.⁶
- [8] In order for the use of “*deadly force*” as defined in s 49(1)(c) to be justifiable in terms of s 49(2), there must be compliance with all of the requirements for the use of non-deadly force as well as either of the two conditions set out in (a) or (b) of s 49(2) of the Act.⁷ Deadly force is defined as “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*”. In the context of the present case, the shooting incident is common cause. To be justifiable under s 49(2), the use of deadly force must, inter alia, satisfy the requirement that the force must be “reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing”. Although this requirement appears in the section as a separate requirement from the two additional requirements set out in s 49(2)(a) and (b), it is clear that both (a) and (b) are informed and influenced by the notion of proportionality.⁸

⁴ See *Ex Parte Minister of Safety and Security and Others: In Re S v Walters* 2002 (2) SACR 105 (CC) para 51.

⁵ See *R v Koning* 1953 (3) SA 220 (T) at 226C–G; see also *S v Gumbi* 1962 (1) SA 188 (D) at 190.

⁶ Section 205(3) of the Constitution of the Republic of South Africa, 1996.

⁷ Du Toit: *Commentary on the Criminal Procedure Act*, RS 70, 2023 ch5-p33; see also *Kotze v Minister of Safety and Security* 2012 (1) SACR 396 (GSJ) para 28.

⁸ *Ibid*; see also *Govender v Minister of Safety and Security* 2001 (2) SACR 197 (SCA) para 21.

- [9] It is so that an act that causes injury to another, or death, is *prima facie* wrongful. However, s 49(2) sanctions the use of force, including deadly force, in certain specified instances when effecting an arrest.⁹ It is clear from the section that the use of deadly force is limited only to those instances where the suspect poses a threat of serious violence to the arrestor or any other person or where 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. Thus, the use of force, including deadly force, is justifiable only in those circumstances provided for in section 49 of the Act.¹⁰ In *Rabothata v Minister of Police* 2021 (2) SACR 544 (GP), the court expressed itself as follows in relevant parts:

‘We live in a constitutional democracy and our Constitution demands respect for the life, dignity and physical integrity of every individual. Whilst s 49(2) of the CPA seeks to grant the right to use force, including deadly force, in certain circumstances, it is the view of this court that its interpretation should be limited to those genuine instances where the life and/or safety of the arrestor or other person is threatened.

. . .

The provisions of s 49(2) referred to above do not and were not intended to give *carte blanche* to members of the SAPS to use force to effect an arrest on any suspect. Force, and lethal force in particular, may only be resorted to when confronted with a situation stipulated in ss (2)(a) and (b). Its interpretation must be such that it promotes the value system of an open and democratic society based on human dignity, equality and freedom.’¹¹

- [10] It is apparent from the foregoing that section 49 of the Act requires an objective inquiry that seeks to ascertain whether there was a less violent means of arresting the suspect. In making such an inquiry, the court should consider the surrounding facts and circumstances, taking into account constitutional values. It has been held that in deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the

⁹ *Rabothata v Minister of Police* 2021 (2) SACR 544 (GP) para 10.

¹⁰ See *Masimula v Minister of Police* [2023] JOL 59903 (GP) paras 41 - 44.

¹¹ See paras 13 and 83.

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.¹²

[11] The appellant raised 15 grounds of appeal, the gist of which is that the court *a quo* erred in:

11.1 Finding that the onus rests on the appellant to prove that he was unlawfully injured by a member of the SAPS;

11.2 Finding that the appellant was not a credible witness as his evidence was riddled with contradictions, improbabilities and inconsistencies when compared with his written statement; and

11.3 Finding that the respondent's witnesses corroborated each other in all material respects.

The evidence:

[12] In view of the trial court's findings on credibility and probabilities, it is necessary, for purposes of this judgment, to deal with the evidence in full.

The appellant's viva voce evidence:

[13] The appellant, a 59-year-old male at the time of the incident, testified that he was employed by Mapogo Security as a security guard since 2004. According to the appellant, he was on duty from 18h00 on 08 April 2017 at the mushroom farm ("the farm"), wearing his full black uniform and a cap, both emblazoned in yellow epaulettes. He patrolled the perimeter of the farm with a torch and a stick. Later that evening, he noticed three SAPS vehicles parked outside the gate of the farm, whereafter he witnessed members of the SAPS break the lock

¹² *Ex Parte Minister of Safety and Security and Others: In Re S v Walters* 2002 (2) SACR 105 (CC) para 54; see also *Khosa and Others v Minister of Defence and Military Veterans and Others* 2020 (2) SACR 461 (GP) para 64.

on the gate to enter the farm. The SAPS members, all armed with firearms, some wearing uniforms, others wearing civilian clothing, approached him. He informed them that he was on duty as a security guard, and enquired as to the purpose of their presence, but they did not respond. Some of the SAPS members assaulted him by pushing him around, kicking and trampling on him. He heard a gunshot, realised that he was shot in his leg, and fell to the ground. He explained that he was afraid, but that he did not act aggressively nor attacked the SAPS members with his stick.

- [14] When cross-examined, the appellant testified that, in addition to the gunshot wound, he also sustained abrasions to his leg as a result of the assault on him by the SAPS members. He elaborated that he was first assaulted by one SAPS officer and then shot. He explained that he only made a statement to the Independent Police Investigative Directorate ("IPID"), and not to the police, as he was treated in hospital and then imprisoned for three days after the incident.

The appellant's written statement to IPID:

- [15] The appellant laid a written complaint to IPID on 08 May 2017 ("the IPID statement / written statement"). The record reflects that the validity of the IPID statement was a contentious issue. The trial was initially postponed as the appellant's legal representative raised concerns that: (a) the IPID statement appeared to have been written by two different persons; and (b) A page thereof was not included. It transpired that the missing page could not be traced and that Ms Breda, who took down the statement, would be called to testify on behalf of the respondent. The legal representative for the respondent confirmed that the statement was made with the assistance of an intermediary who translated the appellant's version, and the translated version was captured. The said legal representative further confirmed that no page was missing, the pages of the statement were just not in the correct order. The IPID statement was provisionally admitted into evidence.
- [16] Whilst the appellant admitted that the IPID statement contained his signature, he testified that he spoke isiXhosa when he deposed thereto, and that the

statement was made to a male person. He, however, persisted that the IPID statement was never read back to him before he signed it. The following discrepancies between the IPID statement and his oral evidence were pointed out to him:

- (a) He admitted that he hit a police officer on his hand and that the said officer's firearm broke, but during cross-examination, he denied that he hit any police officer;
- (b) The assault continued after he was shot;
- (c) The police officers first spoke to him before they assaulted him;
- (d) He was assaulted by more than one police officer; and
- (e) According to the IPID statement, the appellant was assaulted for approximately an hour, but the J88 only confirms the gunshot wound and the bruise on his face.

When confronted with the discrepancies, the appellant denied that the IPID statement is correct or that he hit a police officer; and maintained that it was not read back to him before he signed it. In addition, he persisted that the person who took down his statement did not do so in accordance with his account.

- [17] Ms. Breda testified that she was an investigator, employed by IPID during 2017, and that she investigated the shooting incident that involved the appellant. According to her evidence, the appellant gave his statement in isiXhosa, which was translated into English by Ms. Dlamini, who speaks isiXhosa and isiZulu. Ms. Breda confirmed that she wrote down the complete statement (as translated) herself and insisted that it was read back to the appellant before he signed it. She also confirmed that she commissioned the statement. When cross-examined, she conceded that the statement contains mistakes as she did not peruse it before it was signed. Ms Dlamini corroborated Ms Breda's evidence that pertained to her involvement in the matter, and confirmed that she is neither a trained interpreter nor does she have any accreditation as an interpreter.

The evidence for the respondent:

- [18] In addition to Ms Breda and Ms Dlamini, the respondent called three witnesses to testify.
- [19] Captain Harmse ("Harmse") testified that he and various other SAPS members were informed that an armed robbery would take place on 08 April 2017 at the Lunaka truck depot ("the depot"), next door to the farm. He reported for duty with Sergeant Sereke and Romaine, Constables Ntapileng, Phutiagaya, Louw, Kwesh and Lebitso. They were informed by the Crime Intelligence Unit that there would be an armed robbery taking place at the depot and that there would not be any security staff at the scene. It was a dark evening. Sergeant Romaine yelled at him that he saw a person in the bushes at the farm, whereafter a flare was activated to provide light for a few minutes, and he and six other members went in pursuit of this person. They walked in a line, shoulder to shoulder, in the direction of the bushes. He, Kwesh and Louw broke away from the line; and he noticed a person lying in the tall grass on his stomach, two feet away from him. The light of the flare had gone out, and the visibility was poor. They were dressed in full uniform and bulletproof vests, but none had working torches with them. He was armed with a 9mm pistol, but his colleagues were armed with pistols and R5s. He shouted "police, police, police, police" and was immediately attacked with an object that looked like a panga by the person (appellant). The appellant struck him hard on his left hand with which he was holding the firearm and it fell from his hand. He felt a sharp pain in his left hand. He thought the firearm had fired as he heard an explosion. The appellant continued to hit him and he retreated, feeling petrified. His left index finger had a deep cut and it was operated on the following day. Kwesh and Louw shot at the appellant's legs. The appellant was struck and he fell. Harmse conceded that: (a) He later identified the weapon as a stick; and that it would not have been a life-threatening situation if he had known; and (b) Shooting a person who was attacking him with a stick would not be justified in the circumstances, but added that he was informed that the robbers would be armed and he had no reason to doubt the information. He denied that: (a) There was a gate at the entrance to the farm; (b) They broke the lock; (c) The SAPS members assaulted the

appellant; and (d) The appellant was wearing a Mapogo uniform. According to him, the appellant was aggressive and resisted arrest.

- [20] When he was cross-examined, he accepted that it would have been logical to believe that the farm was also guarded by a security guard on that night. When confronted with his written statement in which he did not disclose that his weapon exploded in his hand when it was struck with the stick, he explained that the damage to the firearm and magazine could not have been caused by the stick. He agreed that neither Louw nor Kwesh, in their written statements, made any reference to the firearm exploding. According to his evidence, the appellant was not assaulted in his presence. He confirmed that none of the members, save for Ntapileng, who fired one shot from outside the farm, fired any warning shots. He also confirmed that none of the SAPS members attempted to restrain the appellant prior to him being shot as everything happened very fast.
- [21] Warrant Officer Louw (Louw) corroborated Harmse's version of the events and added that he decided to fire a shot in the appellant's direction when he saw that Harmse was in danger. Louw testified that Kwesh also fired a shot at the appellant. However, he could not say which shot injured the appellant. According to his observation, the appellant, wearing civilian clothes and not a uniform, was very close to Harmse when he (Louw) fired the shot in the appellant's direction. He also believed that the weapon used by the appellant was a panga, but later saw that it was a stick. When cross-examined, Louw testified that the stick looked like a "piksteel", but conceded that it was a very thin stick. He then added that it could still be considered a deadly weapon. He did not hear any explosion and could not explain how Harmse's firearm was damaged. When they approached the appellant, they noticed that he was an old man.
- [22] Sergeant Kwesh testified and corroborated Harmse and Louw's evidence, save to state that Harmse was only struck twice, once on his arm. Kwesh's evidence was that he also fired a shot in the appellant's direction. He could not remember

whether the appellant was wearing his Mapogo uniform or not. When cross-examined, he disputed that the stick was thin.

Applicable law on appeal:

- [23] It is a trite principle of our law that this court's powers to interfere on appeal with the findings of fact are limited. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.¹³ Consequently, this presumption is rebutted by an appellant convincing a higher court that the trial court's factual findings were plainly wrong. A court of appeal should be aware that the court *a quo* would have been steeped in the atmosphere of the trial and with this advantage, been able to make the necessary credibility findings.¹⁴
- [24] Accordingly, appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial.¹⁵ This Court is also mindful of the fact that the cold record placed before it does not capture all that occurred at the trial. The disadvantage is that the appeal court is denied the opportunity of observing witnesses testify and drawing its own inferences from their demeanour and body language. On the contrary, this is the advantage enjoyed by the trial court. Hence, an appeal court must ordinarily defer to the trial court when it comes to factual findings. Regard being had to the foregoing, unless it can be shown that the trial court has failed to use or has palpably misused its advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. That notwithstanding, it is clear that the due deference afforded to a trial court's credibility findings must not be overstated as same is

¹³ *S v Monyane and Others* 2008 (1) SACR 543 (SCA) para 15; see also *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645E – F.

¹⁴ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 – 706; *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5; see also *Roux v Hattingh* 2012 (6) 428 (SCA) para 12.

¹⁵ See *S v Mathekga and Another* 2020 (2) SACR 559 (SCA) para 14.

not sacrosanct. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case.¹⁶ In light of the above articulated principles, I proceed to consider the grounds of appeal below.

First ground of appeal- onus:

[25] It is trite that every infringement of bodily integrity is *prima facie* unlawful. Thus, an act that causes injury to another, or death, is *prima facie* wrongful.¹⁷ A conduct that appears *prima facie* wrongful may be rendered lawful through a ground of justification which eliminates the apparent wrongfulness of the defendant's conduct. The shooting incident in the present case is common cause. The conduct would be wrongful if it could not be brought within the parameters of s 49(2) of the Act.¹⁸ Thus, the *onus* to establish the justification for the use of "deadly force" as contemplated in section 49 of the Act in the course of a Police Officer carrying out such an arrest rests on the defendant. It has been observed, correctly so, that the kind of detail justifying the application of deadly force is peculiarly within the SAPS member(s) own knowledge, and it's only them who can explain why they employed the degree of force in question.¹⁹ It is trite that, once the infringement has been established, the onus shifts to the defendant to allege and prove the existence of a ground of justification.²⁰

[26] At the commencement of the trial, the court *a quo* acknowledged that the respondent bears the onus to prove the grounds of justification. The court,

¹⁶ *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) paras 37- 40; see also *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) para 106.

¹⁷ *Minister of Safety and Security v Mohofe* [2007] 4 All SA 697 (SCA); 2007 (2) SACR 92 (SCA) para 4; see also *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA); 2002 (6) SA 431 (SCA) para 12.

¹⁸ *Kotze v Minister of Safety and Security* 2012 (1) SACR 396 (GSJ) para 26.

¹⁹ *Mokone v Minister of Police and Another* [2025] JOL 69877 (WCC) para 45.

²⁰ *Mabaso v Felix* 1981 (3) SA 865 (A) at 873E– 874E, cited with approval in *Noor Moghamat Isaacs v Centre Guards CC* [2004] 1 All SA 221 (C) para 7; *Malahe and Others v Minister of Safety and Security and Others* 1999 (1) SA 528 (SCA) at 533J – 534A, 540F-H; *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 (SCA) para 19; See also *Mugwena and Another v Minister of Safety and Security* 2006 (4) SA 150 (SCA) para 25.

however, found that the onus was on the appellant to prove that a member of SAPS unlawfully shot him; and that they failed to comply with their statutory duty as set out in s 49(2) of the Act.

- [27] The court *a quo*'s finding that the appellant bore the *onus* is clearly a violation of an entrenched principle of law and a clear misdirection. This Court is of the view that the factual findings of the court *a quo* were vitiated by a misapprehension of the incidence of the onus. The said finding is not only legally erroneous, but also fundamentally vitiates the factual and credibility findings apparent from the judgment.²¹ Consequently, this Court is accordingly entitled to reassess the evidence and determine the issues afresh.

Second ground of appeal- the court *a quo*'s credibility findings in respect of the appellant:

- [28] The parties presented conflicting versions of the shooting incident.
- [29] The court *a quo* made the following credibility finding in respect of the appellant's evidence:

'Now, the appellant was not necessarily a bad witness, but his version of the events is riddled with contradictions, improbabilities and inconsistencies.'

- [30] In *National Employers' General Insurance Co Ltd v Jagers*,²² the court set out the correct approach to be adopted in analysing and assessing evidence in a civil case as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version

²¹ See *Nqadala v Minister of Police* [2023] ZAECHMHC 23; 2023 JDR 1522 (ECM) para 23.

²² 1984 (4) SA 437 E at 440D-G.

is true and accurate and therefore acceptable, and that the other version advanced by the respondent is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the respondent's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the respondent's version is false.'

- [31] In resolving a factual dispute, I am guided by the following principles laid down in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*:²³

'... The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings

²³ 2003 (1) SA 11 (SCA) at 14 –15 para 5.

compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.’

- [32] From the judgment, it is clear that the court *a quo* reached the conclusion about the appellant’s evidence based substantially on the discrepancies between his *viva voce* evidence and his written statement. This being so despite the court’s expressed dissatisfaction that the statement was “poorly taken down if one referred to the grammar, the handwriting and the language.”
- [33] Mr. J Harmse, on behalf of the appellant, placing reliance on *Nqadala v Minister of Police* (“*Nqadala*”),²⁴ contended that the court *a quo* analysed the evidence from the incorrect vantage point that the appellant bears the onus to prove that he was unlawfully shot; and that the members of the SAPS failed to comply with s 49(2) of the Act.
- [34] In *Nqadala*, the court of appeal found that the unfortunate misdirection on the part of the learned judge had profound consequences for the basis on which he evaluated the evidence, and for his extensive credibility findings. The court of appeal concluded that the court *a quo*’s judgment reflects a misapprehension regarding the evidentiary burden, which resulted in an overly critical analysis of the evidence adduced by the appellant.²⁵
- [35] It is so that, where contradictions and inconsistencies arise in evidence, the court’s task is not to determine which version is correct in a literal sense, but rather to assess whether the witness may have erred due to defective recollection or dishonesty. The Supreme Court of Appeal has articulated the proper approach to such contradictions. In this regard, the approach to contradictions between two witnesses and contradictions within the evidence of a single witness (for example, between *viva voce* testimony and a prior

²⁴ [2023] ZAECHMC 23; 2023 JDR 1522 (ECM).

²⁵ *Ibid* paras 6 and 13.

statement) is, in principle, the same.²⁶ Useful guidance in this regard may be sought in *S v Mafaladiso en Andere*²⁷ where the headnote (in English) reads:

‘The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions – and the quality of the explanations – and the connection between the contradictions and the rest of the witness’ evidence, amongst other factors, [are] to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely, to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.’

[36] I am mindful of the several discrepancies between the appellant’s *viva voce* evidence and his written statement, specifically pertaining to whether the

²⁶ See *Siphungu v Minister of Police and another* [2022] JOL 57021 (ECM) para 42.

²⁷ 2003 (1) SACR 583 (SCA) at 584 – 585; *S v Mkhohle* 1990 (1) SACR 95 (A) at 93E-I; See also *Robinson and Others v S* [2019] JOL 41057 (KZP) para 9.

appellant was assaulted by the SAPS members or not, the manner of the alleged assault, and whether he was wearing his Mapogo uniform. In *S v Mahlangu and Another*²⁸, the Court made the following insightful observations: 'By reason of the criticism levelled at police witness statements, I find it necessary to restate the principles relating to written statements by witnesses. In order to discredit a witness who made a previously inconsistent statement it must be shown that the deviation was material (*S v Bruiners en 'n ander* 1998 (2) SACR 432 (SE) at 437e; *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 593e). Deviations which are not material will not discredit the witness. Police statements and statements obtained from witnesses by the police, are notoriously lacking in detail, are inaccurate and often incomplete . . . It would be absurd to expect a witness to say exactly in his statement what he will eventually say in court. There will have to be indications other than a mere lack of detail in the witness's statement to conclude that what the witness said in court was unsatisfactory or untruthful.

There is no law that compels a witness what to say and what not to say in his statement. The witness tells it as he sees it. He is not expected to relate in his statement what he saw in the minutest detail. Should a witness through a lapse of memory or any other valid reason omit some detail which later could become important, he should not as a matter of course be branded as being untruthful. Moreover the mere fact that a witness deviates in a material respect from what he said in his statement does not necessarily render all his evidence defective. The court will in the final analysis consider the evidence as a whole in order to determine in what respects the witness's evidence may be accepted and in what respects it should be rejected. Counsel who act on behalf of accused persons, are wont to pounce on any differences, no matter how insignificant, which may arise between an extra-curial statement of a witness and the witness's testimony in court (see *S v Govender and others* 2006 (1) SACR 322 (E) from 326c, where Neppen J gives an insightful discourse on this topic). The witness is often lambasted where his testimony in court gives more detail than what appears in his written statement. The more differences that can be found between the statement and the testimony in court, the more successful counsel feels his cross-examination has been. However, as has been pointed out, that is not the correct approach. The test is: were the differences material, always bearing in mind

²⁸ [2012] JOL 29277 (WC) at 41-42.

that a witness's testimony in court will almost without exception be more detailed than what the witness said in his written statement.²⁹

- [37] What is, however, of importance is that it is common cause that: (a) The appellant was shot by a member of the SAPS; (b) The appellant only carried a relatively thin stick with him on the evening in question; and (c) The shooting incident happened within a confined area of 2,5m by 2,5m. The appellant's version in respect of these three material aspects was, in fact, corroborated by the respondent's witnesses.
- [38] Furthermore, it bears emphasis that the record reflects that the court *a quo*, contrary to the warning in *Nqadala*, analysed the evidence from the incorrect vantage point that the appellant bears the onus to prove that he was unlawfully shot; and that the members of the SAPS failed to comply with s 49(2) of the Act.
- [39] Taking into consideration that police statements are frequently not taken with the degree of care, accuracy and completeness desired;³⁰ and should not be regarded as a precursor to a witness's testimony in court,³¹ I can reach no other conclusion than that the court *a quo* erred in finding that the appellant was not a credible witness.

Third ground of appeal - The respondent's witnesses corroborated each other in all material respects:

- [40] I agree that Harmse, Louw and Kwesh corroborated each other as they all testified that: (a) The appellant did not wear a Mapogo uniform; (b) the appellant struck Harmse's hand in which he held his firearm; and (c) Harmse was attacked by the appellant with a weapon resembling a panga or a "piksteel".

²⁹ See also *Siphungu v Minister of Police and Another* [2022] JOL 57021 (ECM) para 45.

³⁰ *S v Xaba* 1983 (3) SA 717 (A) at 730B-C.

³¹ *S v Govender and Others* 2006 (1) SACR 322 (ECD) at 325-326.

- [41] Nonetheless, the respondent's witnesses' evidence cannot withstand complete scrutiny as their versions contained various discrepancies about the details of the attack on Harmse and the damage to his firearm.

Analysis and conclusion:

- [42] The crux of this matter is whether the respondent established, on a balance of probabilities that the conduct of the SAPS members in the circumstances of the present case falls squarely within the ambit of section 49(2) of the Act. It bears emphasis that the shooting incident is common cause. In terms of the Act, "deadly force" is defined as a 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*. Accordingly, the Respondent is required to satisfy four aspects under section 49 of the Act. 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."³²

- [43] I have not lost sight of the warnings in the authorities against an armchair judgment of police action that must often be taken quickly in dangerous circumstances for the effective prevention of crime or the protection of the public. However, I also have not lost sight of the importance of a balanced evaluation. It is necessary to balance the responsibility of the police to carry out their difficult duties effectively, on the one hand, against the constitutional rights

³² *Ramasike v Minister of Police* [2024] JOL 66913 (GJ) para 24.

to life and bodily integrity which lie at the root of the proper understanding and application of s 49 of the Act, on the other.

[44] The Constitutional Court in *Ex parte Minister of Safety and Security and Others: In re S v Walters*³³ laid down specific guidelines for how the courts should apply the tests of reasonable necessity and proportionality to the use of potentially deadly force to prevent a suspect from fleeing from arrest. The criteria being:

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

³³ [2002] JOL 9743 (CC); 2002 (2) SACR 105 (CC) para 54.

- (i) These limitations in no way detract from the rights of an arrester attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.’
(My emphasis underlined.)

[45] I see no reason why the same criteria should not be applied in *casu*.

[46] The court *a quo* paid scant attention to the principles outlined in the foregoing criteria. The Magistrate merely summarised that:

‘Now, also looking at the photographs of the crime scene, it appears that it was pitch dark at the time of the incident. The officers were there to arrest armed robbers and it is probable that they could have thought that the appellant is one of the robbers, especially when the person they could not identify disarmed their colleague and injured their colleague.’

[47] Even if the respondent’s witnesses’ version that the appellant attacked Harmse is accepted as credible, the following objective facts and evidence, which the record reflects a lack of consideration of, should have been considered by the court *a quo*:

47.1 The three police officers were fit, young and experienced. They were all armed and wearing bullet proof vests. As such, they were required to act, in circumstances like these, to the best of their ability;

47.2 The appellant was a 59-year-old man at the time of the incident;

47.3 Although the respondent’s justification was pre-dominantly underpinned by a perception that Harmse was being attacked with a panga or a “piksteel” in the dark, the incident took place in an area of 2,5m/2,5m, which to my mind would have probably improved visibility of the appellant and his weapon, a thin stick;

- 47.4 The concessions by the respondent that the shooting of a person who was attacking an officer with a thin stick would not be justified in the circumstances;
- 47.5 The failure to present evidence that there was no alternative way to intervene in the attack or apprehend the appellant;
- 47.6 The failure to use less force; and not firing a warning shot, save for the one fired by Ntapileng;
- 47.7 The evidence that Kwesh and Louw aimed at the appellant's legs, each firing once in his direction, and not at the ground; and
- 47.8 The only injury caused to Harmse's left hand, according to the J88, was a wound as "an open wound through and through the left index finger".

[48] In *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA), the Court, albeit dealing with a prevailing version of section 49 of the Act at the time, made the following instructive observations which remain apposite in the present case:

'I am of the view that, in giving effect to s 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 so doing, full weight should be given to the fact that the fugitive is obviously young, or unarmed, or of slight build, etc, and, where applicable, he could have been brought to justice in some other way. In licensing only such force, necessary to overcome resistance or prevent flight, as is 'reasonable', s 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.

Applying this broader approach, I am of the view that the shooting of Justin was unlawful. If one were to apply the test of proportionality between seriousness of the offence and the force used, it may correctly be said that the theft of a motor vehicle is a serious offence and, having regard to the high incidence of this offence in our country, one that should be combated vigorously. Against that, the use of a firearm to shoot at another person is also a serious, inherently lethal, matter. But it is when the broader approach of proportionality between the threat posed by the fugitive and the degree and nature of the force used, is applied, that the scale is tipped in favour of Justin. He was unarmed and Cox did not see a weapon in his possession. He was 17 years old and it must have been obvious to Cox, when he commenced the pursuit of the fugitives, that they were mere youths. There was no allegation of hijacking, assaults or other acts of physical violence having been perpetrated by Justin or the other passengers in the car. Nor was there any threat or danger to the police or members of the public. Under these circumstances, what interest of society was so pressing that it justified the violation of Justin's physical integrity? Can it be said that in our law the protection of property (via the criminal law system) is invariably more important than life or physical integrity? Surely not. It has not been shown by the respondent, on whom the *onus* rests, that the identity of the occupants of the stolen vehicle could not have been established by proper investigative procedures, for example fingerprinting of the vehicle, eyewitness accounts of the theft, etc.

Can s 49(1) of the Act reasonably be interpreted to encompass the approach discussed above? I am of the view that it is eminently possible. The section includes the test of reasonable necessity. That test was already given a wider meaning by this Court in *Matlou v Makhubedu (supra)*, viz proportionality between the force and the crime committed. It does no violence to the section to interpret it so that the 'threat' or 'danger' approach is included - and, in my view, that should be done.

The words 'use such force as may in the circumstances be reasonably necessary . . . to prevent the person concerned from fleeing' in s 49(1)(b) of the Act must therefore generally speaking (there may be exceptions) be interpreted so as to exclude the use of a firearm or similar weapon unless the person authorised to arrest, or assist in arresting, a fleeing suspect has reasonable grounds for believing

1. that the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public; or

2. that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm.

If s 49(1) of the Act, thus interpreted, is applied to the facts before us and for the reasons indicated above, I am of the view that Cox acted unlawfully in shooting at and wounding Justin.³⁴

[49] I am persuaded that the respondent, in the circumstances of the present case as set out above, had other means to subdue the appellant without inflicting violence / shooting him. The force applied was not reasonable or proportional to the threat of violence posed by the appellant.

[50] The version of the police falls short of meeting the statutory requirements. In the absence of any legal justification, the *prima facie* unlawfulness of the respondent's conduct is conclusive; and constituted an unlawful assault upon the appellant.

[51] It is correct that, where a defendant fails to satisfy all the statutory requirements for the successful invocation of section 49(2) as a ground of justification, the impugned conduct is not thereby rendered lawful. Reliance on section 49 must accordingly fail. That, however, is not dispositive of the matter. Where it emerges as a reasonable possibility that the members of the South African Police Service concerned genuinely believed, subjectively, that they were acting within the confines of the section, the defendant may yet avoid liability on the separate basis of the absence of fault. Thus, even if, on an objective conspectus of all the evidence, the court concludes that the use of force was not necessary to effect the arrest, with the result that the conduct is wrongful, the enquiry may not end there. The question of fault may still have to be determined. If it is established that the arrestor bona fide (although erroneous) believed that the use of force was necessary to effect the arrest, such belief may exclude intention (*dolus*). Moreover, where such belief is not only genuine but also one which a reasonable person in the position of the arrestor might have held, negligence (*culpa*) may likewise be excluded.³⁵ In *Kgaleng v Minister*

³⁴ Paras 21-24.

³⁵ J Burchell, PJ Schwikkard and TB Mosaka, *Burchell's Principles of Criminal Law*, 6th edition (2025) at 147.

of Safety and Security and Another [2001] 4 All SA 636 (W), the Court, having rejected the plea of justification on the facts, nevertheless observed:

‘The defendants may yet escape liability on the basis that the second defendant’s bona fide (although erroneous) belief that his conduct was justified, excluded consciousness of wrongfulness – and thus fault in the form of *dolus* – on his part, and provided a reasonable man would not have reacted differently to the way in which the second defendant reacted under the circumstances – thereby excluding fault in the form of *culpa*.’³⁶

[52] On a conspectus of all the evidence, I am satisfied that, both objectively and subjectively, the members of SAPS acted outside the scope of s 49(2) of the Act. I accordingly find no merit in the contention that their conduct was justified. There is, in the circumstances, no basis upon which the respondent can escape liability.³⁷

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

1. The appeal is upheld with costs on a party and party scale B as set out in Rule 69(7), read with Rule 67A(3) of the Uniform Rules of Court.
2. The order of the Regional Court, Kimberley, is set aside and replaced with the following:
 - “1. The defendant shall be liable for 100% of the plaintiff’s proven damages arising out of the injuries the plaintiff sustained when he was shot by the police on 08 April 2017.
 2. The defendant shall pay the plaintiff’s costs of suit.
 3. The quantification of the above damages is postponed *sine die*.”

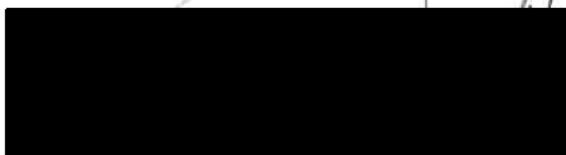
³⁶ Para 16.

³⁷ See *S v Mathekgwa and Another* 2020 (2) SACR 559 (SCA) paras 6, 15, 17 and 18.



STANTON J
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I concur



GROENEWALDT AJ
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

For the appellant:

Adv. J Harmse

Instructed by:

Elliott Maris Attorneys

For the respondent:

Mr. M Ramabulana

Instructed by:

Office of the State Attorney.