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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D8533/2021

In the matter between:

OMAR ISMAIL

FIRST PLAINTIFF

ASMA MAHOMED

SECOND PLAINTIFF

REHANA BANU MAHOMED

THIRD PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

This Judgment was handed down electronically by circulation to parties representatives via email. The date and time of hand down is deemed to be the 30th of April 2026 at 13:00

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ORDER

The following order is made:

1. The condonation application for the late filing of the notice to the defendant is granted.

2. The plaintiffs' claim is dismissed, with no order as to costs.

JUDGMENT

Sipunzi J

Introduction

[1] This is a claim for damages arising from an incident where members of the same family suffered gunshot bodily injuries whilst they were the occupants in their VW Polo with registration number N[...] (Polo). The third plaintiff, who is the mother of the second plaintiff, also claims damages arising from the emotional shock that she suffered when she arrived at the scene, shortly after the incident. The first and second plaintiffs also claim damages suffered by their minor child, who was also a passenger in the Polo. The claim for damages is against the Minister of Police (the defendant) in his capacity as the Minister responsible for the conduct of members of the South African Police Services (SAPS) in executing their duties. The plaintiffs seek judgment in the following terms:

- (a) condonation for the late and/or irregular notice;
- (b) in respect of the first plaintiff, payment of the sum of R5 353 450, plus past/future medical expenses which are to be quantified;
- (c) in respect of the second plaintiff, payment of the sum of R8 256 326, plus past/future medical expenses which are to be quantified;
- (d) in respect of the third plaintiff, payment of the sum of R500 000;
- (e) in respect of the minor child, payment of the sum of R500 000;
- (f) interest on the aforesaid sums at the legal rate from date of demand and/or summons to date of payment;
- (g) costs of suit; and
- (h) further, other or alternative relief for and in respect of each of the respective plaintiffs including the minor child.

[2] In line with Uniform rule 33(4), there was a separation of merits and quantum, as agreed by the parties. The matter proceeded on the merits. The plaintiffs' application for the condonation of late filing of the notice in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 was unopposed. Upon consideration thereof, the application was granted.

[3] At the commencement of the trial, by agreement and without a concession that the defendant had the onus of proof, the defendant elected to lead evidence first. The presentation of the defendant's evidence sought to demonstrate that:

- (a) there was a legitimate reason why the members of the defendant were dispatched to the area where the shooting occurred;
- (b) they acted out of their legal duty as members of the defendant, to prevent a robbery situation that was unfolding;
- (c) the force displayed by the members was reasonable;
- (d) the plaintiffs' motor vehicle voluntarily drove into the line of fire; and
- (e) the defendant raised the defence of *volenti non fit iniuria*.

[4] In the plaintiffs' case, they sought to provide evidence that:

- (a) in the evening of 16 July 2020, the first and second plaintiffs and their daughter were together in their motor vehicle, driving home as a family;
- (b) on their way home, they encountered the police who were in two motor vehicles, a BMW sedan and a VW Transporter;
- (c) without any provocation, the members of the police alighted from their motor vehicles and opened fire on them;
- (d) the first plaintiff believed that they were under attack by robbers;
- (e) they all suffered serious bodily injuries due to bullet wounds inflicted during the shooting;
- (f) the third plaintiff suffered emotional shock from observing her daughter with such injuries; and
- (g) the police had no justified reason to fire gunshots that caused them serious bodily injuries.

Evidence in the defendant's case

Colonel Mashilo

[5] During 2020, Colonel Mashilo was the Acting Unit Commander and the Operational Commander of the National Intervention Unit of the SAPS (NIU). On 16 July 2020, he assigned six members to the execution of an operation that was led by Captain Pillay. For the purposes of the operation, these members were issued with two motor vehicles and six rifles, in addition to their routine service pistols.

[6] Later that evening Mashilo attended to a crime scene where these members were involved in a shooting incident. On arrival at the scene, he had limited interaction with one Mr Ishmael Jiwa (Jiwa). Jiwa voluntarily informed him that he was the owner of a security company and furnished him with his cell phone number. He could not get into the precinct of the crime scene. For him, it sufficed to confirm that there was the incident and that their members were involved.

Captain Pillay

[7] Captain Pillay was a member of the NIU. She testified that sometime before 16 July 2020, the NIU had been observing a pattern of incidents involving robbery of motor vehicles in the Overport City area. Their preliminary investigations revealed that there was a syndicate of about six members who were engaged in a spate of motor vehicle robberies in the area. These robbers were specifically targeting the male congregants of the Muslim religious community who would be robbed when they were attending their routine prayer gatherings at the surrounding mosques. This syndicate was involved in bank robberies and also served as hitmen. The NIU had gathered information that the members of the syndicate were, among others, armed with AK47, R1 and R5 rifles. They were also using a stolen silver-grey Toyota Etios sedan, with fraudulent registration number N[...]2 (Etios).

[8] As they were monitoring the activities of this syndicate, they learned that in the morning on 16 July 2020, there was a robbery of a BMW motor vehicle. They became aware that in the evening on 16 July 2020, the syndicate was poised to carry out further

criminal activities in the Overport City area. Hence six NIU members were dispatched to the area to intercept planned criminal activities of the syndicate. Their operation commenced in the afternoon and progressed into the evening. The assigned police vehicles were a BMW bearing registration number H[...] (BMW) and a VW Transporter with registration number N[...]3 (VW). They were all dressed in navy-blue combat uniform, with black bullet proof vests and black helmets.

[9] After the shooting incident and as part of their responsibilities, the NIU members reported that three of the six issued rifles had been discharged at the crime scene. The fired rifles were the R5 that was issued to Warrant Officer Tshabalala and the two R1 rifles that had been issued to Warrant Officers Naidoo and Munsami. Pillay later learned that there had been an exchange of gunshots between the members and the occupants of the targeted Etios. About two weeks after the incident, the Etios was confiscated during the course of investigations by the members from premises in Hammersdale.

Six NIU members

[10] The NIU members testified that initially they anticipated the Etios from Chesterville and they planned to follow the vehicle when it exited the area. However, after they learned that the Etios had already left for Overport City, they proceeded to the route, in a convoy, led by the BMW. The driver of the BMW was Warrant Officer Mseleku, with Munsami as the front passenger and Naidoo as the right rear passenger. The driver of the VW was Warrant Officer Nathoo, with Shabalala and Nduku as passengers.

[11] When they arrived in Overport they spotted two Toyota Etios' which fitted the description of their target. However, upon closer investigations, they concluded that these vehicles were not their target. As they proceeded within their area of deployment, they drove down Hill Street. The BMW stopped when it reached the intersection of Hill Street and Sheringham Road. It had to drive over the stop line, into Sheringham Road

as this was necessary because the view of motor vehicles coming from the left was blocked by a wall.

[12] Whilst the BMW was stationary, there was a stationary Polo on the left. Behind the Polo, to the left, there was a stationary Etios with open doors. Armed with firearms, three to four occupants were crouching towards the Polo. Armed with his rifle, Munsami jumped out of the BMW and shouted 'police'. Occupants from the Etios fired shots at him, and as he ducked to evade the shots, he also returned gunfire.

[13] Simultaneously, the Polo moved forward and collided with the BMW. Shabalala joined in the exchange of gunfire at the occupants of the Etios. Persons from the Etios went back into the vehicle and sped off as the gunfire continued. The BMW gave chase, however after a short distance it halted. He denied that NIU members from the VW fired shots at the Polo.

[14] According to Naidoo, when Munsami jumped off, he also tried to follow. He had managed to partially get out of the vehicle, but his right foot got stuck under the seat and he could not exit the vehicle. He took cover behind the seat as the gunfire continued. After the Polo collided with the BMW, both vehicles moved due to the impact. As they chased the Etios, he fired a shot, using the R1 rifle. He was aiming for its tyre but did not strike it. He denied that the Polo was in motion when they saw occupants of the Etios approaching it from behind. He denied that the shots that struck the Polo were fired from the BMW. He denied ever telling the plaintiffs that they had shot the wrong people. According to him, he offered his assistance when he interacted with the first plaintiff.

[15] Mseleku testified that when they reached the intersection of Hill Street and Sheringham Road, on the left side, there was a boundary wall which obscured his view into Sheringham Road. He had to drive over the white yield line, to get a view of the left side of Sheringham Road. There, he saw the stationary Polo with its lights on. There was a stationary Etios behind it, with its lights off and doors open. There were people

attacking the Polo. Immediately, Munsami jumped off, and there was an exchange of gunfire between Munsami and the assailants.

[16] As the driver of the BMW, Mseleku would not leave the driver's position, and he took cover by putting his head down. After the collision between the Polo and the BMW, he chased the Etios to no avail. The BMW could not move further due to collision damage. A bystander remarked that he saw the Etios driving into West Road.

[17] Shabalala testified that when they approached the Hill Street and Sheringham Road intersection, he saw Munsami jumping off the BMW. He could also see Naidoo trying to jump out but he did not get out. He heard Munsami shouting 'police'. He heard gunshots and saw muzzle flash coming from the bush on the left towards Munsami and he was shooting back. He ran on the pavement towards Sheringham Road, firing shots from his R5 Rifle.

[18] The Polo collided with the BMW and both vehicles moved. The Etios drove past down Sheringham Road as shots were fired from it. As the gunfire continued, Shabalala returned fire and fired five shots at the Etios, using the R5 rifle. He was in Hill Street when he fired the shots. The BMW drove for a short distance and stopped before it reached West Road.

[19] Nathoo, who was the driver of the VW and Nduku did not alight from the VW during the exchange of gunfire. It was Shabalala who jumped out after the gunshots had begun going off. When he heard someone shouting 'chase' he did not react. Nduku explained that the VW could not chase the Etios as they could not leave the crime scene.

[20] After the Etios had disappeared, they attended to the occupants of the Polo, who were injured. An ambulance was called and the injured received emergency medical attention. There were many people that came from the nearby residential area. The NIU members denied that they contaminated or interfered with the crime scene. They

observed that the BMW had gunshot damages on the windscreen and the left front light/panel. After they had left the scene, they went back to their office and fully accounted for the firearms and ammunition that was allocated for the purpose of the operation.

Eyewitnesses

[21] Mr K Arunachellam was residing in Hope Street at the time of the incident. This was a lane that joined Sheringham Road, a short distance from the intersection of Hill Street and Sheringham Road.

[22] According to him, during the evening of 16 July 2020 he was walking out of Sheringham Road into Hope Street. He saw an Etios that was stationary, with its lights off. Its doors opened fast and the occupants jumped out. Then he heard gunshots. He did not know who was firing the gunshots, he became afraid and ran. After the shooting he saw police motor vehicles and went back to the area. He spoke to a police officer but could not recall the name.

[23] Mr Malkum Subramoney testified that on 16 July 2020, he was at the barber shop, near the crime scene and facing towards West Road. He was sitting in his motor vehicle, in the queue for the barber shop. He heard gunshot sounds in Sheringham Road. He walked closer to see what was happening. As he was walking, he came across a silver Toyota Etios. It was screeching its tyres and drove at high speed into West Road. The Etios did not stop at the intersection, and he was not able to see the number of occupants in the vehicle.

[24] As he came closer to the crime scene, he saw the BMW. He spoke to the police and informed them of what he observed. He was however told that he could not enter the cordoned area of the crime scene. He also noticed many people within the area of the crime scene.

Members of SAPS who attended the crime scene after the incident

[25] Warrant Officer Banparthab from the Local Criminal Record Centre (LCRC) attended the crime scene on 16 July 2020, at 21h15, about two hours after the incident. He took photographs and compiled a photo album. He also collected 16 cartridges and a black firearm, with a wooden handle and no serial number, and a magazine with five cartridges. He kept the exhibits in his custody until they were sent to respective units of the SAPS. He also inspected the BMW and found that it had accident damage and bullet holes. The bullet holes were on the windscreen and bonnet where the accident damages were also visible. He took photographs of these damages whilst the BMW was still at the crime scene.

[26] Warrant Officer Maney learned about the incident at 19h15, he went to attend the crime scene, in the company of Sergeant Maphumulo. On their arrival, the crime scene had already been cordoned off, however there were members of the public within the cordoned area. Jiwa who was in a security officer uniform reported that he observed the incident as he was standing outside Sheringham flats. According to Jiwa, there was a shooting between the police and those in a Toyota Etios.

[27] He only noted the report of Jiwa for his purposes. He did not obtain a statement from him because from the appearance of his uniform, he thought that Jiwa was a police officer.

[28] On 29 July 2020, Colonel Muriam, handed over three rifles that were utilised by Munsami, Tshabalala and Naidoo to Warrant Officer Ngcobo of the Independent Police Investigative Directorate (IPID). Ngcobo had requested rifles with specified serial numbers. If he had requisitioned any other firearms they would have been given to him.

Evidence in the plaintiffs' case

Eyewitnesses

[29] Mr Leluma testified that at the time of the incident he was residing at Sheringham flats. His residence was on the fourth floor; which had a balcony from which he could view Sheringham Road. When he witnessed the incident, he was standing on his balcony, smoking. He first heard a loud bang and turned to see what was happening behind him. He saw the BMW and the Polo at the corner of Sheringham Road and Hill Street. He also saw three people who were shooting guns in Hill Street, running into Sheringham Road. These people were facing towards West Road, shooting at the Polo. He also stated that these people came from the VW. As he was walking towards the crime scene, he could see the NIU members picking up cartridges from the ground.

[30] There was a collision between the Polo and the BMW, after which the BMW moved and then became stationary at the intersection of Sheringham and West Roads. The Polo also moved before it came to a standstill on the pavement in front of Sheringham flats. Then a person got out of the BMW and went towards the three persons who had been firing at the Polo.

[31] He used his cellular phone to take photos of the crime scene, also depicting the shootist with khaki colour pants. He also pointed another person who was wearing a white trench coat as the second shootist. Before the ambulance arrived, he saw the police collecting cartridges in the yard of Sheringham flats. Later on, he also went to the crime scene. According to him, the incident lasted a few seconds, and it unfolded quickly. He denied that there was a silver Toyota Etios at the time of the shooting. When Warrant Officer Nzama obtained a statement from him, he had enquired if he saw a Etios, to which he responded in the negative.

The first plaintiff

[32] The first plaintiff testified that he was the driver of the Polo. His wife (the second plaintiff) and daughter were passengers and seated in the back seat. They were going home and driving along Sheringham Road. As they were approaching the intersection of

Sheringham Road and Hill Street, the BMW came out of Hill Street. The first plaintiff stopped at the intersection. He had to slow down because the BMW drove into his path on Sheringham Road.

[33] Two male passengers jumped off the BMW and from a distance of about ten to 20 meters, they fired shots at the Polo. He thought that the persons from the BMW were robbers. He lowered his head behind the steering wheel and accelerated, driving forward. The Polo then collided with the BMW. From the point of impact, both motor vehicles moved for short distances and the Polo became stationary on the pavement. At that point he felt that he was struck from the gunshots. Shortly afterwards a person from the BMW came to him and asked if he was okay. He asked the same person to attend to his wife and call an ambulance. When the ambulance arrived, he handed his licenced firearm and licence to this person.

[34] He believed that he and his family were injured during a robbery situation. After approximately a week, following his release from hospital, he made a statement about the incident. At that time, he had become aware that the police were involved in the shooting. He denied that there was a silver Toyota Etios behind the Polo at the time of the incident. Although the incident unfolded quickly, if there was an Etios, he would have seen it.

[35] He confirmed that he spoke to journalists from Carte Blanche and Special Assignment about his experience and concerns that the matter was taking too long to be resolved. He was worried that even though the incident occurred in 2020 the matter was set down to be held in September 2025. He denied that he informed his legal representative that the Polo was always in motion, including the time before the shots were fired. According to him, the Polo was stationary at a distance of about ten to 20 meters from the BMW.

[36] When it was put to him that another witness would claim that he saw the Etios at the crime scene, he said that he may not have seen it. He confirmed that in the

statement that his wife made to the police, she mentioned that the BMW was silver in colour. He explained that his wife made an error, however, they did not get to correct her statement to indicate that it was a white BMW.

The second plaintiff

[37] The second plaintiff confirmed that she was seated in the back seat of the Polo with their daughter. When they reached the intersection of Hill Street and Sheringham Road, their motor vehicle stopped. Then there were gunshots fired. She did not see where the gunshots came from. She took cover by lowering her body and her daughter down. She also saw that her husband had been struck. She said a prayer.

[38] Thereafter a person approached her husband and asked if they were okay. At that point she saw that she had been struck on her leg, she was in pain and her husband was bleeding. Paramedics arrived and they were conveyed into the ambulance. She was always conscious; and she phoned her mother to report what had happened. Her mother arrived and took the child from her. She lost consciousness after she had been admitted in hospital. During treatment, her right leg was amputated, and a bullet remained lodged in her left leg.

The third plaintiff

[39] The third plaintiff testified that she was the biological mother of the second plaintiff. She arrived at the crime scene after the shooting incident. The plaintiffs had not at this stage been transported to the hospital. On arrival, the first plaintiff requested her to take his hat. She took the baby from the second plaintiff and had not seen that the baby had been injured. She handed the child to other family members who had also arrived at the crime scene. The second plaintiff was taken out of the Polo and put into the ambulance. They spoke and she accompanied the second plaintiff as she was transported to the hospital. On the way to hospital, she assisted in directing the

ambulance driver via a shorter route. She remained in company of the second plaintiff at the hospital.

Other witnesses

[40] Sergeant Manilal testified that he attended the crime scene on 30 September 2020, at the instance of the Investigating officer, Captain Naidoo in Mayville Cas 26/08/2020. He was in company of Naidoo and Mseleku. The purpose of his role was to reconstruct the scene. The source of information for his reconstruction was the statement of the first plaintiff, the photos that he received from Banparthab and an interview with Mseleku.

[41] In his report, he recorded that when driving down Hill Street into Sheringham Road there was a boundary wall of about 1.2 metres height. This wall was obstructing the view of the left of Sheringham Road, which necessitated a driver from Hill Street to drive over the yield line . He recorded that the Polo became stationary at 33 meters and the BMW 83 meters after the point of impact. He did not pay much attention to the nearby Hope Street, which was also enjoining into Sheringham Road, because it had no significance for his purposes.

[42] Warrant Officer Kader who was a Forensic Analyst from the ballistic unit also testified. During the investigation of Mayville Cas 50/07/2020 he examined various firearms, bullet projectiles, bullet spent cartridges, and the child car seat from the crime scene. He also had access to the report of Banparthab who had attended the crime scene on 16 July 2020 and, who had collected some exhibits and compiled a photo album. He also had regard to the 'Road Crime Crash Investigation Report' that had been compiled by Manilal, regarding the reconstruction of the accident scene and motor vehicles involved. On 28 July 2020, he examined the Polo and observed eight entry bullet holes and collision damage on the right-side fender, right bumper, headlight, the front and rear windscreens and a front right flat tyre. There was one fired bullet on the carpet of the left side of the back cabin. When he perused the report and photo album of

Banparthab he observed that the BMW had damage on the lower region of the front windscreen closer to the driver's side, as well as front left side accident damage. From these sources, he then compiled his report.

[43] In relation to the bullets that struck the Polo and its occupants, he opined that the shootists were in three positions, namely the right to left, front to back and back to front. He also opined that the bodily injuries sustained by the occupants were consistent with high calibre bullets.

[44] Kader¹ also opined on the trajectory of the fired bullets which were collected by Banparthab as marked ABCD, PQR ,EFHJG and KLMN in the photo album. Kader also opined that the three rifles which were issued to the NIU members, namely R1 with serial number P2553 and P4296 fired the cartridges marked G1; G2 and D.² He also examined the R5 rifle with serial number 3[...]. He determined that cartridges marked AA; BBB AND ABCEFLM were fired from n R5 rifle.³ He concluded the possible places where each shooter would have been at the time they discharged the respective bullets. For instance, he concluded that if the R1 rifle was fired from the yield sign at the intersection of Hill Street and Sheringham Road, the cartridge would land beneath the tree on the right-hand side of the shootist. He testified that he did not test or analyse the two 9mm pistol spent cartridges as there was no firearm against which they would be tested. He also concluded that the final rest positions of the fired cartridges from the rifles suggested that the shooters were along Hill Street close to the intersection of Sheringham Road and behind the Polo. In relation to the Polo, and in his ballistic report dated 1 June 2021, he opined that bullet holes were fired from outside.⁴

[45] Phumlani Ngcobo, an investigating officer of Mayville CAS 50/07/20, who was an Assistant Director from IPID also testified. He testified that in the course of his investigations, he also perused the shooting report that was compiled by Captain

¹ Exhibit "A" - Volume 2, Ballistic report crime scene analysis by Kader, pages 170-178 para 10.20.

² Exhibit "A" - Volume 2, Ballistic report crime scene analysis by Kader, pages 170-178 para 3.2 and 3.3, and page 181

³ Ibid, para 3.1

⁴ Ibid, para 10.20

Ngema. According to this report Naidoo, Shabalala and Munsami had fired shots at the time of the incident. On that basis, he requested the firearms that were utilised by these officers, being the two R1 (serial numbers P2753 and P4296) and one R5 (serial number 3[...]) rifles. He was also seized with the investigation of the matter that related to the Toyota Etios that was later recovered from premises in Hammersdale during investigations by the NIU members.

Issues

[46] The above factual matrix raises a number of factual and legal questions, which require determination. Such questions include:

- (a) The preliminary issue raised by the defendant that the first plaintiff assumed the risk of harm when he deliberately drove the Polo into a collision with the BMW.
- (b) Who bears the onus of proof between the plaintiffs and the defendant.
- (c) Whether there was a stationary Etios when the BMW and the VW conveying the six NIU members reached the intersection of Hill Street and Sheringham Road.
- (d) Whether there was exchange of gunfire between the NIU members and the occupants of the Etios.
- (e) Whether the NIU members were engaged in an authorised operation when the shooting occurred.
- (f) Whether the members of the NIU acted reasonably when they fired gunshots at the crime scene.
- (g) Whether the defendant was liable for the damages incurred and suffered by the plaintiffs.

The law

[47] Section 205(3) of the Constitution provides that:

'The objects of the police service are 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.'

[48] Section 49(2) of the Criminal Procedure Act 51 of 1977 (the CPA) provides for circumstance where there may be use of force in effecting arrest. The section provides:

'(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.'

Evaluation

Onus

[49] The submission made on behalf of the plaintiffs was that they had the onus to establish that the defendant was liable in delict for the damages they suffered. However, they contended that because the defendant pleaded justification of necessity, the onus shifted to the defendant. On behalf of the defendant, it was acknowledged that although

it had the constitutional and statutory duty to protect the public, in this instance, the reason why the defendant should not be held liable was premised on the contention that the NIU members acted out of necessity as their conduct was motivated by the criminal activity of the occupants in the Etios. According to the defendant this Etios was at the crime scene, and its occupants were in the process of attacking the plaintiffs.

[50] The plaintiffs bear the onus to prove that it was the shots fired by the NIU members which injured or caused them damage. If they proved that the defendants did injure or cause them damage, and the defendant pleaded justification, the defendant bears the onus to prove the justification of its conduct or action. If regard is had to the factual matrix at hand, the primary question is whether the plaintiffs presented evidence which established that the defendant was liable in delict for damages they suffered. Therefore, the plaintiffs bear the onus to establish on a balance of probabilities that the defendant, through the unlawful conduct and fault of its NIU members was liable for the damages they suffered on 16 July 2020.⁵

[51] Regard must be had to the defendant's pleadings in which it did not admit that the NIU members fired the gunshots at the plaintiffs. The defendant raised a ground of justification of necessity and self-defence. Whilst the plaintiffs bear the overall onus to show that the conduct of the defendant was unlawful, once the defendant relied on the justification defence of necessity and self-defence, the defendant must present the facts upon which the members based their contention that it was necessary for them to discharge their firearms at the crime scene.

[52] The first plaintiff, who was the driver of the Polo sustained gunshot injuries to the right occipital region; middle line of the back and the right shoulder. The second plaintiff, his wife and passenger in the back seat of the Polo sustained gunshot injuries to both legs. Her right leg was amputated from the knee. Their daughter who was also a passenger suffered two gunshot wounds to the left arm and abrasions to her abdomen. It is common cause that the third plaintiff who is the mother of the second plaintiff

⁵ National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) at 440D.

arrived at the crime scene after the shoot-out had occurred. She assisted her injured family members by taking the child from the Polo; she took the hat from the first plaintiff and accompanied the second plaintiff in the ambulance to the hospital. There was also undisputed evidence that the Polo had gunshot and motor vehicle collision damage.

The Etios

[53] At the centre of the dispute between the parties was whether there was an Etios whose occupants were in the process of attacking the plaintiffs at the crime scene. There is also a dispute that it was not only members of the NIU who discharged firearms at the crime scene. There was however no challenge to the evidence that the first plaintiff was in possession of a firearm and that he did not discharge his firearm during the shooting. The plaintiffs disputed the presence of the Etios and its' occupants in their immediate vicinity or the involvement of an Etios during the shooting that unfolded. The plaintiffs' claims were on the basis that there was no Etios at any stage during the shoot-out that occasioned their bodily injuries. On the other hand, according to the defendant, it was the presence of the Etios and the activities of its occupants that were the motive for the shoot-out. The defendant contended that three of its members on the scene discharged their firearms to avert the attack; in defence of themselves and the plaintiffs as they were being attacked by the occupants of the Etios.

[54] In this regard, there are two mutually destructive versions in that the plaintiffs assert that they were unlawfully shot at and injured by members of the NIU, who, in turn deny the liability, contending that when they fired the shots they were acting out of necessity. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et CIE and Others*,⁶ it was held that:

‘...The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To conclude on the

⁶ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et CIE and Others* 2003 (1) SA 11 (SCA) para 5.

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' 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 extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (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 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.'

[55] The factual witnesses on whose evidence the technique outlined above finds application included Leluma and the first and second plaintiffs. In the defendant's case such witnesses would be the six members of the NIU who were engaged in the operation; Subramoney and Arunachellam. There was also the evidence of Banparthab and Kader who investigated the crime scene. Unlike the NIU members whose version was corroborated by Arunachellam and Subramoney, Leluma and the plaintiffs testified that the Etios was not at the crime scene. Leluma heard a bang behind him and turned to look on the road. He was noncommittal whether the bang that drew his attention was

the sound of gunshots or that of the collision of the BMW and the Polo. Nevertheless, it can be accepted that he did not observe the incident from the beginning as he did not see either the BMW or the Polo when they halted at the Sheringham Road and the Hill Street intersection. He would also not have witnessed what Arunachellam claimed to have seen before he ran into Hope Street.

[56] It seems that Leluma had substantially limited opportunity to observe the incident, compared to other eyewitnesses. According to him, the three shootists were wearing khaki pants; another navy-blue pants and another with a whitish trench coat. He said this in the face of unchallenged evidence that the NIU members were wearing their combat gear, which was navy and black in colour.⁷ He gave contradictory versions in that he first said the three shootists were running from Hill Street into Sheringham Road when he first saw them, yet he was also emphatic that he saw the shooters coming from the VW.

[57] His evidence regarding the absence of the Etios was corroborated by the plaintiffs. However, in her initial police statement to the police, the second plaintiff stated that according to her husband, they were attacked by a silver BMW, whereas the first plaintiff had recorded that they were attacked by a white BMW. The first and second plaintiffs testified that the Polo was stationary when they were at the intersection of Sheringham Road and Hill street. However, in cross-examination, the first plaintiff denied that he told his legal representative that the Polo was always in motion and did not stop. Yet it was put to the defendant's witnesses that the Polo did not stop. Although the first plaintiff denied that the Etios was at the crime scene, in cross-examination, he indicated that a possibility existed that he may not have seen it. These inconsistencies rendered the plaintiffs' observations unreliable.

[58] The NIU members corroborated each other from the time they first encountered the Polo until the time the crime scene was attended to by the ambulance and various members of the SAPS. Their version of the presence of the Etios was corroborated by

⁷ Photographs of the NIU Kit, Exhibit "O."

Arunachellam and Subramoney who were eyewitnesses to the shooting. They were each able to give a coherent account of how the events unfolded and gave no impression that their versions were formulated to create a particular narrative. Jiwa's report to Maney carried no probative value because he did not testify.

[59] There is undisputed evidence of Mseleku and Banparthab that the BMW had bullet or gunshot damage on the windscreen and on the left head lamp.⁸ This damage would have been possible if there was a shooter that took aim at the BMW or its occupants. There had been no evidence that there was any further discharge of firearms after the failed chase of the Etios. The presence of the gunshot damage to the BMW eliminated or minimised the likelihood that the NIU members were fabricating their version to allege that there was an Etios whose occupants were engaged in an exchange of gunfire with them. It was common cause that there were no gunshots fired from the Polo.⁹ Therefore, someone else must have taken aim at the BMW.

[60] It is common cause that after the collision, the Polo and the BMW moved from the point of impact. The BMW drove for a distance of 83 meters, and according to Naidoo who was the passenger and Mseleku who was the driver, they were chasing the Etios, towards the Sheringham and West Roads intersection. However, due to the collision damage, the BMW could not drive further and stopped before it reached the intersection. On the question of probabilities, if regard be had to the fact that the BMW was stationary at the time of the collision, logic dictates that because the Polo was in motion at the time of the collision, it would move further away from the point of impact than the BMW before it halted.

[61] The fact that the BMW came to a halt further than the Polo, short of reaching the West Road intersection, supports Mseleku and Naidoo's version that the BMW pursued the Etios. Naidoo's undisputed evidence that he discharged his rifle at the Etios's tyres reinforces this. Such actions would have been unnecessary if there was no vehicle to

⁸ Index to Exhibit "A" – Volume two, as depicted in photographs 30 and 31.

⁹ Mayville Cas 50/07/2020, Exhibit "A28" at page 177 (Report of Kader, last bullet point).

chase. It is therefore improbable that the BMW moved away from the Polo without any cause. The pursuit towards Sheringham and West Roads strongly indicates the presence of the Etios and a motive to intercept it.

[62] It has also transpired in the evidence that although the crime scene was cordoned off, many people from the nearby residences managed to get into that area. There were spent cartridges that were in excess of the number of shots that were fired by the NIU members during the shooting. The presence of a firearm that was picked up by Banparthab (with a wooden handle) and cartridges that were not issued to the NIU members at the crime scene, also strengthened the narrative that there were other role players other than the dispatched NIU members and the Polo.

[63] Overall, the inconsistency apparent in the plaintiffs version that there was no Etios at the crime scene, coupled with the gunshot damage to the BMW; the presence of a firearm and ammunition beyond those issued to the NIU members; the failed pursuit of the Etios; the evidence of the NIU members; and of eyewitnesses, including Arunachellam and Subramoney, overwhelmingly demonstrated that there was an Etios, with occupants who were firing gunshots.

[64] In the assessment of the evidence in totality one was mindful that the contamination of the crime scene may have compromised forensic integrity. Applying the technique in *Stellenbosch Farmers' Winery*, the plaintiffs' and Leluma's accounts were outweighed by the consistent and corroborated testimony that there were others beside the BMW, the Polo and the VW at the crime scene. The evidence strongly supports the conclusion that an Etios was present at the crime scene and its occupants engaged in an exchange of gunfire with the NIU members. Accordingly, evidence denying the presence of the Etios is inconsistent with objective evidence and inherent probabilities and must be rejected.

Necessity

[65] Having found that the Etios and its occupants were present at the crime scene and engaged in an exchange of gunfire with the NIU members, the next enquiry is whether the harm suffered by the plaintiffs was caused by the NIU members or in circumstances that were justified. This requires an objective assessment of whether the NIU members reasonably intervened and whether the force they used was proportional and unavoidable in the circumstances. As a general rule, members of the SAPS will be absolved from liability if they used deadly force in circumstances where it became necessary to protect themselves or others from an imminent threat of death or serious bodily harm. Their conduct would be justified if the threat was imminent, they acted as a last resort and if the force used was proportional in the circumstances.¹⁰ Whether a situation of necessity existed is a factual question which must be determined objectively.¹¹ In this exercise it must be borne in mind that the members were under a statutory duty to protect and prevent harm to themselves and the plaintiffs.¹²

[66] The defendant mainly relied on *Ntsomi v Minister of Law and Order*¹³ where the court took guidance from the test set out in *Ntanjana v Vorster and Minister of Justice*,¹⁴ as follows:

“The very objectivity of the test, however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating at the time he acted. The Court must be careful to avoid the role of the armchair critic wise after the event, weighing the matter in the secluded security of the courtroom.... Furthermore, in judging the matter it must be ever present to the mind of the Judge that, at any rate in the particular circumstances of this case, the person claiming to act in self-defence does so in an emergency, the creation of which is the work of the person unlawfully

¹⁰ Section 49(2) of the CPA.

¹¹ *Petersen v Minister of Safety and Security* [2009] ZASCA 88; [2010] 1 All SA 19 (SCA) (*‘Petersen’*) para 11.

¹² Section 205(3) of the Constitution.

¹³ *Ntsomi v Minister of Law and Order* 1990 (1) SA 512 (C) (*‘Ntsomi’*) at 528F-H. Confirmed by the SCA in *Ntsomi v Minister of Law and Order* [1992] ZASCA 104.

¹⁴ *Ntanjana v Vorster and Minister of Justice* 1950 (4) SA 398 (C) at 406A-D.

attacking. The self-defender is accordingly entitled to have extended to him that degree of indulgence usually accorded by the law when judging the conduct of a person acting in a situation of imminent peril. "Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons", *per* Innes JA in *Union Government (Minister of Railways & Harbours) v Buur* 1914 AD 273 at 286.'

[67] The defendant did not admit that the shots fired from the firearms of the NIU members struck any of the plaintiffs or that they caused their bodily injuries in any form. However, the defendant admitted that the bodily injuries and damage to the plaintiffs' Polo were caused when the members were in a confrontation with the Etios and its occupants.

[68] There was also evidence and opinion produced from the exhibits that were collected from the crime scene included observation of Lehuma; reports from Manilal and Kader, and the photo album of Banparthab.¹⁵

The evidential value of their reports and opinion in relation to which bullets may have struck the plaintiffs must be viewed in light of the fact that:

- (a) When Sgt Mannie first heard about the incident, it was about 15 minutes after the shooting, he then made his way to the crime scene. When he arrived, there were already other police officers who arrived before him. Among them was W/O Basha who had already picked up some spent cartridges.
- (b) Before Sgt Banparthab arrived, W/O Nzama had already found 2 x 9MM cartridges; 2 x R5 Rifle spent cartridges and 2 x .38 spent cartridges.
- (c) When Banparthab arrived about two hours after the incident, the precinct of the crime scene was active with members of the public moving within unmonitored.

¹⁵ Durban LCRC photo album compiled by Banparthab.

- (d) Leluma testified that before the police arrived, he saw the NIU members picking up cartridges from the crime scene.
- (e) Leluma gave the clothing description of the shooters, which was distinct to the uniform of the NIU members.
- (f) Banparthab had also found a black firearm with a wooden handle, with no serial number. It had one magazine with five cartridges, which could not be regarded as a firearm that had been issued to the NIU members.
- (g) There were also 2 x 7.65mm calibre fired cartridge cases; 2 x 9x19mm calibre fired cartridges; 3 x .38S&W calibre cartridges and a 7.65mm calibre Pietro Baretta found, with no account of where they came from.
- (h) Kader examined the Polo on 28 July 2020 at the request of Ngcobo from IPID but did not get the opportunity to examine the BMW.

[69] In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*,¹⁶ it was held that: ‘But our law also recognises that there are circumstances in which even positive conduct that causes bodily harm will not attract liability. That is so where the harm is caused in circumstances of necessity, which have been described as occurring when the conduct is “directed against an innocent person for the purpose of protecting an interest of the actor or a third party (including the innocent person) against a dangerous situation”. It is well established that whether particular conduct falls within that category is to be determined objectively. That the actor believed that he was justified in acting as he did is not sufficient. The question in each case is whether the conduct that caused the harm was a reasonable response to the situation that presented itself.’ (Footnotes omitted.)

[70] Therefore, the evidence may also be examined in order to determine whether the NIU members’ conduct (in discharging their firearms) caused the bodily injuries and harm to the plaintiffs. This calls for a close assessment of the evidence that related to the investigation of the crime scene and the likely impact of the members of the public

¹⁶ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* [2006] ZASCA 168; 2007 (2) SA 118 (SCA) (‘Crown Chickens’) para 10.

who had gained access to the crime scene before exhibits were photographed; picked and preserved.

[71] In order for Kader to give an opinion on the trajectory of the bullets fired and the firearms from which they were discharged, he examined the points at which the cartridges were picked up by Banparthab. He had regard to the damages that were on the Polo when the photographs were taken and when he inspected it at the private premises where it was kept after the incident. In the analysis Kader considered the cartridges that were collected from points marked ABCD, PQR, EFHJG and KLMN against the bullet damages on the Polo. These led him to determine the positions where the shooter/s would have been located when those shots were fired.

[72] However, in his analysis, he did not indicate if he considered that the crime scene was not preserved for some time after the shooting and that the cartridges were marked and collected by Banparthab who arrived after over 2 hours . Kader also did not indicate if he have regard to the reality that the movement of the members of the public within the crime scene may have displaced or varied the positions of the fired cartridges from their original positions. The opinion of the trajectory of the fired bullets in relation to the shootist did not seem to factor in the description of the clothing given by Lehuma, as opposed to the uniform of the NIU members. The photos taken by Leluma on his cellphone also depicted several people who were not wearing NIU members' uniform inside the crime scene.

[73] Leluma had also testified that shortly after the shooting he saw NIU members picking up cartridges from the crime scene before police arrived. Furthermore, Leluma stated that one person he saw firing the gunshots was wearing khaki colour pants, another one, a whitish trench coat and the third, navy-blue pants similar to the police uniform. His description in this regard has to be considered in light of the evidence that the members of NIU were wearing their combat uniform that was navy blue with black bullet vests and black helmets.

[74] Having said that, when the question of whose bullets may have struck the plaintiffs arises, it must also be borne in mind that, in *Petersen* it was settled that:¹⁷

‘...the defence of necessity does not require that the defendant’s action must be directed at a wrongful attacker’.

The Supreme Court of Appeal (the SCA) held that there was no need for the respondent to establish that the injured was himself part of the attacking crowd. The SCA went on to state:¹⁸

‘What the respondent had to prove in order to establish the justification defence of necessity appears for example, in broad outline, from the following statements in *Delict*’ 8(1) Lawsa (2ed) by J R Midgley and J C van der Walt, para 87:

“An act of necessity can be described as lawful conduct directed against an innocent person for the purpose of protecting an interest of the actor or a third party ... against a dangerous situation ...

Whether a situation of necessity existed is a factual question which must be determined objectively. ...

A person may inflict harm in a situation of necessity only if the danger existed, or was imminent, and he or she has no other reasonable means of averting the danger. ... The means used and measures taken to avert the danger of harm must not have been excessive, having regard to all the circumstances of the case ...”

[75] In this instance, the apparent failure to preserve the crime scene before the exhibits were picked up or collected and before photographs, particularly by Banparthab, were taken rendered the evidence gathered at the crime scene to be unreliable and of substantially diminished value. Particularly, in so far as the opinion of Kader and Manilal on the deemed positions of the shooters; the trajectory of the bullets

¹⁷ *Petersen* para 11.

¹⁸ *Ibid.*

discharged and the points where they landed or were found. Accordingly, on a balance of probabilities, and on objective facts, the evidence failed to establish whose bullets among the shooters struck the plaintiffs as the incident was unfolding.

[76] That said, for the purposes of determining if in the circumstances the NIU members acted out of necessity and if the use of force was reasonable when they discharged their firearms it matters not whether it was the bullets discharged from their firearms or those of the Etios occupants that struck the plaintiffs in the Polo.¹⁹

[77] In the case at hand, the gunshots that would, among other factors, be decisive as to whether it was necessary for the NIU members to discharge their firearms would be those gunshots that were fired before the motor vehicle collision. In this regard, Leluma's version of events would not be helpful. Leluma was not committal on which bang came first between the motor vehicle collision and the gunshots. His observation is suggestive that he did not observe what preceded the bang that alerted him to the incident. Leluma would not testify to what prompted Munsami to alight from the BMW and/or gainsay the evidence that Munsami shouted in alerting the alleged assailants that they were the police. Leluma would not be in a position to provide any assistance in regard to the veracity of the observations of Arunachellam and the occupants of the BMW, who stated that the assailants from the Etios were crouching towards the Polo and armed with firearms. It remained uncontested that the collision between the BMW and the Polo was preceded by gunshots.

[78] In this instance, the first reaction of the NIU members was that Munsami jumped out of the BMW, and he alerted the occupants of the Etios that it was 'police'. The attackers were not deterred, but instead they opened gunfire at him. He then began shooting back at them and was later joined by Tshabalala and Naidoo. The discharge of gunfire was continuous as corroborated by Naidoo and Mseleku.

¹⁹ Ibid.

[79] Weary of adopting ‘the role of the armchair critic wise after the event, weighing the matter in the secluded security of the courtroom’,²⁰ evidence revealed that standing by and watching as the robbery of the Polo unfolded required swift action. Any delayed response from the NIU members was equally undesirable. When the evidence is assessed objectively, the facts have laid bare that the situation encountered by the members induced the necessity for them to intervene.

[80] Evidence has overwhelmingly established that the plaintiffs and the NIU members were exposed to the danger of loss of life or injury as the occupants of the Etios were attacking the Polo. The situation that was unfolding quickly was an exposure to a risk of severe danger in which it was necessary to act swiftly.

Proportionality of the force used

[81] The next question is whether the force used was strictly proportionate, meaning whether no lesser intrusive means were reasonably available in that moment. So, having acted out of necessity, the NIU members must also demonstrate that when they fired the shots, there was no realistic, available alternative at the time they acted and that the force used was proportional in the circumstances. As pointed out in *Crown Chickens*, it must be considered whether the conduct that caused harm was a reasonable reaction to the situation that presented itself. When the *Ntsomi* decision became the subject of appeal, one of the questions was whether the necessary act of the police was reasonable and proportionate in the context in which they acted. The SCA emphasised that self-defence must be necessary and reasonable in relation to the attack averted.²¹

[82] *Ntsomi* was decided on the strength of a pre-constitutional era principle as set out in *Ntanjana* and later approved by the SCA.²² More recently similar questions arose

²⁰ *Ntanjana* at 406A-B and approved in *Ntsomi*.

²¹ *Ntsomi v Minister of Law and Order* [1992] ZASCA 104.

²² *Ibid.*

in *Minister of Law and Order v Milne*,²³ and the central focus of the court was whether the conduct of the police was reasonable and justified. In a rather constitutionally based assessment, the court held that risk of death or serious injury must be real and imminent in order to justify homicide, “in keeping with contemporary notions of the value to be attached to human life”.²⁴ The court held that:²⁵

‘It ought not to be thought that, once there is some risk of death or injury, resort may necessarily be had to lethal force merely because that is the only means available to repel the risk.’

The court examined the actions of the police with greater scrutiny and concluded that the use of force was objectively unreasonable. The court clarified that the defence of self-defence would succeed if the defendant established two separate and distinct requirements; namely, necessity and that the use of force was not excessive. It considered the steps taken to mitigate the harm and pointed out that it had to be judged objectively.

[83] In *Ntamo and Others v Minister of Safety and Security*,²⁶ the interpretation of self-defence was developed to infuse the constitutional duties of the police in the assessment of the reasonableness of their reaction. Therefore, *in casu*, when assessing reasonableness, it must be borne in mind that the NIU members’ core constitutional mandate remained ‘to prevent, combat and investigate crime, to maintain public order, and to protect and secure’ the members of the public, as they enforced and uphold the law. In *Ntamo* it was held that ‘unlike ordinary members of the public, police receive special training in order to equip them with the necessary skills for the proper and effective performance of their duties.’²⁷ So, as the reasonableness of the actions of the

²³ *Minister of Law and Order v Milne* 1998 (1) SA 289 (W) (Milne).

²⁴ *Ibid* at 294C.

²⁵ *Ibid* at 293C-D.

²⁶ *Ntamo and Others v Minister of Safety and Security* 2001 (1) SA 830 (TkH) and *Minister Of Safety And Security v Ntamo And Others* 2003 (1) Sa 547 (SCA) (Ntamo).

²⁷ *Ibid* para 26.

NIU members is assessed, standard applicable to them is higher than that of an ordinary member of the public.

[84] The incident of 16 July 2020 was a culmination of investigation into the syndicate that was involved in the spate of robberies within the Overport City area. According to Mashilo and Pillay, they became aware of the calibre of weapons that the syndicate members utilised in their robbery operations. According to Pillay, they had profiled the members of the syndicate and knew that they were also involved in planned killings and bank robberies. Hence the NIU members were dispatched with six rifles in addition to their service pistol firearms and two motor vehicles. The NIU members were therefore, lawfully authorised to take part in an operation that sought to intercept the activities of a syndicate of robbers that was operating in the Overport City area.

[85] They went into the area dressed in their combat uniform; helmets and bulletproof vests. They patrolled the streets, with particular attention to where the mosques were situated. Before they came across their target, they had approached two other motor vehicles, with similar features. So, they were prepared and ready to interact with the occupants of the Etios. Suggesting that they had some plan or strategy on how they would react and/or respond if they encountered them. Even if the NIU members had ample time to plan; prepare and strategize for their anticipated operation, when the occupants of the Etios began to fire shots at them they were faced with a moment of crisis. The NIU members and the plaintiffs in the Polo were in an emergency situation that required considered and measured reaction. When NIU members spotted the Etios, with its occupants crouching towards the Polo with firearms, Munsami's initial reaction was to alert them to the presence of the police in order to stop the robbery. In the set-up of the crime scene, a reasonable police officer would have been expected to be considerate of the reality that the area was a densely populated residential area and within few paces from the plaintiffs' motor vehicle. However, when the warning was ignored and when shots were fired at them, the return of gunfire was unavoidable.

[86] When compared to *Ntamo*, the confrontation with the occupants of the Etios placed the plaintiffs and the NIU members in a situation of danger; leaving them with no real opportunity to execute whatever plan or strategy they may have had in anticipation of their target. As Naidoo testified, when he fired the shots, he aimed at the tyres of the Etios; Mseleku drove off to chase off the Etios and there was no aim at the plaintiffs. There was no space or time to sit and plan on how to approach the robbery situation and there were no factors to suggest as they reacted on real time that they bungled or failed in their duty to the public at large and the plaintiffs.

[87] Objective facts and evidence presented demonstrate that discharge of gunfire was a proportional reaction to the threat of harm that confronted the NIU members and the plaintiffs. With reference to *Milne* and *Ntamo*, assuming that the NIU members had received special training which had equipped them with skill for reaction to similar situations, one considered if there could have been anything to do rather than shooting back at the assailants. In arguments for the plaintiffs, it was submitted that there was evidence that there were safe and effective alternatives that were available. It was suggested that the VW could have pursued the Etios rather than engage and that NIU members had ample opportunity to reassess the situation and desist.

[88] In my view, this argument failed to appreciate that the NIU members were reacting to a robbery that had commenced as the occupants of the Etios were already crouching towards the Polo; then, in quick succession, gunfire commenced, after they disregarded the warning from Munsami that it was the police. It also failed to consider that as the shooting was unfolding the VW was behind the BMW, already in Hill street. Nathoo also testified that it was impossible to leave the crime scene and that driving to Hope Street was practically impossible in the circumstances. This argument falls squarely within the armchair criticism described in *Ntanjana v Voster* above and cannot hold. It seems that resorting to lethal force was justified as it did not appear that there were any realistic alternatives that could be explored, even if it could be assumed that the NIU members had prior conceived plans and strategy for their operation.

[89] According to the first plaintiff, initially, he believed that they had survived a robbery. Shortly after the shooting, whilst at the crime scene, he also spoke to Naidoo. He voluntarily informed Naidoo that he had a firearm in his possession. He presented his licence to Naidoo and alerted Naidoo to his family on the back seat. Their interaction, whilst at the crime scene is not consistent with the first plaintiff belief that the NIU members were out to kill him. Furthermore, Munsami was in close proximity to the Polo when he alighted from the BMW. If the plan was to kill the first plaintiff, there was no better opportunity than that for Munsami to execute that plan. On the contrary, evidence has shown that the NIU members actively assisted the plaintiffs.

[90] On a conspectus of the evidence, the NIU members were in a moment of crisis, they displayed the standard of reasonableness of a reasonable police officer in the manner in which they reacted to the situation, particularly when the occupants of the Etios ignored Munsami's warning, and firing shots instead.²⁸ The evidence they presented demonstrates that their manner of reaction to the attack by the occupants of the Etios was necessary and justified to protect life of the plaintiffs and themselves.²⁹ However, in their unfortunate situation, the first plaintiff; the second plaintiff and their child sustained serious bodily injuries.

[91] Reflecting on the circumstances in which the NIU members reacted, their conduct was without negligence. In the manner in which the incident unfolded, it cannot be said that the NIU members failed in their objective to protect the interests and life of the plaintiffs who were the primary target of the occupants of the Etios.³⁰ An objective assessment of their response did not reveal that they were negligent or that the force they employed was disproportionate. The efforts of the NIU members in averting to avert the attack; their endeavours to apprehend the attackers and also protect life was the last means proportionate in the circumstances.³¹ Therefore, the NIU members acted out of necessity, they demonstrated that the force used was proportionate in the

²⁸ *Kruger v Coetzee* 1966 (2) SA 428 (A).

²⁹ Criminal Procedure Act, 51 of 1977, S49.

³⁰ *Crown Chickens* para 10; *Monareng v Majories Trading Enterprise CC* 2025 (3) SA 574 (GP) para 57.

³¹ *Petersen* para 11.

achievement of defence against the violence that was displayed by occupants of the Etios.³²

Assumption of the delict by the first plaintiff

[92] According to the first plaintiff, when the shots were being fired, he lowered his head down, taking cover so as to avoid being struck. He accelerated, causing the Polo to move forward and resulting in a collision with the BMW. It was this conduct that prompted the defendant to contend that the first plaintiff voluntarily assumed the risk by driving into the gunfire, wherefore his negligent conduct contributed to the injuries that were sustained. The defendant submitted that when the first plaintiff drove into the path of fire, he assumed the risk.

[93] The principle that is most suitable to apply to the circumstances of this case was laid down in *Castell v De Greef*³³ where the court held that:

“South African law generally classifies *volenti non fit injuria*, irrespective of whether it takes the narrower form of consent to a specific harm or the wider form of assumption of the risk of harm, as a ground of justification that excludes the unlawfulness or wrongfulness element of a crime or delict.”

For consent to operate as a defence the following requirements must, *inter alia*, be satisfied:

- (a) the consenting party “must have had knowledge and been aware of the nature and extent of the harm or risk”;
- (b) the consenting party “must have appreciated and understood the nature and extent of the harm or risk”;
- (c) the consenting party “must have consented to the harm or assumed the risk”;

³² *Ntamo*, Flynote at 830G-H.

³³ *Castell v De Greef* 1994 (4) SA 408 (C) at 425G-I. Quoting from Van Oosten *The Doctrine of Informed Consent in Medical Law* (unpublished doctoral thesis, University of South Africa (1989)) at 423-8

(d) the consent “must be comprehensive, that is extend to the entire transaction, inclusive of its consequences”.’

[94] The question to be answered is whether the first plaintiff’s conduct amounted to a consent to injury or risk and therefore amounted to a *volenti non fit iniuria*. For this to be imputed to the first plaintiff, he must have formed an intention to expose himself to the danger. The approach to the first plaintiff’s reaction must take into consideration that he believed that he was in a robbery situation and acted in haste according to his perspective of what was unfolding. It must also be borne in mind that throughout the incident and even when he was in hospital, he always believed that he survived a robbery attempt. If found to have acted with intent, it would raise a question whether such conduct was contributory to the negligence of the defendant, if the defendant were found to have been negligent at all.

[95] Upon a value judgment of the situation that was unfolding, as the shots were being fired, there was no evidence to suggest that the first plaintiff had any knowledge and appreciation of the nature and the extent of the risk they were exposed to. The evidence has laid no basis to suggest that he may have consented to the harm or even alive to the imminent consequences of the gunfire. Evidence has also established that the plaintiff may not have been aware that the BMW and the VW were police vehicles and that he genuinely believed that he was in a robbery situation. It seems that the acceleration of the Polo into the collision was in part the first plaintiff’s reaction to the shooting that subsequently exposed him and his family to unexpected danger, as he believed that there was a robbery unfolding.

[96] In my view any suggestion that the first plaintiff acted with intent or that any fault could be imputed to him fails to appreciate the volatility and unpredictable circumstances in which he was forced to act. Even if driving into the BMW did contribute, there has been no causal link between the first plaintiff’s manoeuvre and the gunshot injuries. Therefore, he cannot be held to have consented to the injury on the basis of how he reacted in that emergency situation or that he may have failed to react

in any particular way to avoid the danger. In the circumstances, no fault could be attributed to him for driving into a collision with the BMW, and the defence of *volenti non fit iniuria* does not succeed.

Claim in respect of the third plaintiff

[97] It is common cause that the third plaintiff was not present at the time of the shooting. She arrived at the crime scene after she received a call from the second plaintiff (her daughter), when she was reporting the shooting incident. It is also common cause that on her arrival at the crime scene, she spoke to the first and the second plaintiffs. She found her granddaughter crying hysterically and removed her from the second plaintiff. At that point she had not seen that her grandchild was also injured. After she had passed her grandchild to other family members that were in her company, she attended to the first and second plaintiffs. She also accompanied the second plaintiff to the hospital and stayed in her company through the night. When the ambulance was driving to the hospital, she was directing the ambulance driver on the correct route to take. She also testified that she was traumatised as she thought that her daughter had succumbed to her injuries.

[98] The evidence in this regard must be considered to assess whether the third plaintiff demonstrated an actionable claim of emotional shock against the defendant. As the SCA held in *Road Accident Fund v Sauls*,³⁴ the third plaintiff bears the onus to establish that the emotional shock she suffered caused her detectable psychiatric injury, and that it was unlawfully caused by the conduct of the defendant through its members.

[99] The third plaintiff gave mutually destructive statements about her injury. She stated that she thought that her daughter had died. On the contrary, the evidence that she was always composed and actively helping the plaintiffs at the crime scene as well as the ambulance driver to the hospital is not consistent with a person that suffered psychological harm from the shock. These statements are contradictory and rendered

³⁴ *Road Accident Fund v Sauls* [2001] ZASCA 135; 2002 (2) SA 55 (SCA) (Sauls).

her evidence unreliable for the determination of what could have caused her harm, if any. The claim that she thought the second plaintiff had died was not consistent with the chronology of events she related.

[100] Furthermore, the third plaintiff did not provide evidence that her emotional shock was actionable because she provided no detectable links to her psychiatric conditions.³⁵ The third plaintiff demonstrated no form of impairment that could be associated with her emotional shock. She did not provide the factual basis upon which it could be concluded that the emotional shock she allegedly suffered caused any injury to her psychological or psychiatric well-being. Her level of composure and alertness at the crime scene and afterwards are the striking factors that distinguished her circumstances to those in Sauls. Furthermore, in the case of the third plaintiff there was no subsequent diagnosis of chronic post-traumatic disorder. Her claim falls to be dismissed.

Conclusion

[101] The presence of the Etios at the crime scene, whose occupants engaged in gunfire exchange with the NIU members has been proven. On the objective assessment of the evidence in totality, the members acted out of necessity, in circumstances where the plaintiffs inside the Polo and the NIU members were exposed to danger. The defendant has established facts upon which it demonstrated that the use of force was proportional and reasonable in the circumstances. Accordingly, their reaction to the attack by the occupants of the Etios was duly measured and without fault. On a balance of probabilities, the first and second plaintiffs have not established the unlawfulness or fault on the part of the NIU members. Even if it had been established that the bullets or some of them that struck the plaintiffs came from the NIU members, which finding I did not make, the defendant has proved on a balance of probabilities that their conduct was justified by necessity. The defendant has not established the defence of *volenti non fit iniuria*, in the case of the first plaintiff.

³⁵ *Komape and Others v Minister of Basic Education and Others* [2019] ZASCA 192; 2020 (2) SA 347 (SCA).

[102] The third plaintiff's claim for emotional shock is not supported by evidence and she failed to demonstrate on a balance of probabilities that her experience from the crime scene caused any detectable harm to her psychological and psychiatric health.

Costs

[103] With regard to costs, counsel were *ad idem* that there should be no departure from the norm that costs follow the result, including the costs of two counsel where employed, on scale C. Upon reflection on the conduct of the parties throughout the proceedings, I considered that the plaintiffs were members of the public who litigated against the State in order to vindicate their rights, in the belief that they could seek remedy.

[104] It is trite that the award of costs is in the discretion of the court and that costs generally follow the outcome of a case, meaning that the losing party will pay the costs of the winning party.³⁶ However in *Affordable Medicines Trust and Others v Minister of Health and Others*,³⁷ the Constitutional Court introduced a different approach, in that an unsuccessful litigant in proceedings against the State ought not be ordered to pay the costs, particularly where the litigant sought to vindicate their constitutional rights. In that spirit, and upon the exercise of my judicial discretion, I considered the substance of the plaintiffs' claim. Upon reflection thereto, I reached a determination that it would offend the interests of justice if the general norm was applied in their case. Fortified by *Affordable Medicines Trust* in this regard, I determined that there should be no order to costs in their instance.

Order

³⁶ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC) para 3.

³⁷ *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC) para 138.

[105] The following order is made:

1. The condonation application for the late filing of the notice to the defendant is granted.
2. The plaintiffs' claim is dismissed, with no order as to costs.

Sipunzi J

Case information

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Date of hearing: 08 December 2025

Date of judgment: 30 April 2026