



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

Case No 15964/2013

In the matter between:

MARK STEMMET

Plaintiff

And

CITY OF CAPE TOWN

Defendant

Coram: Pangarker J

Hearing dates: 3 September 2024; 8 November 2024 (postponed); 24 - 25 February 2025; 5 - 6 May 2025; 8 September 2025

Judgment delivered: 19 August 2026

Summary: *Delict* – Claim for damages to the plaintiff's property sustained during a search in terms of section 21 of the Criminal Procedure Act 51 of 1977 – The plaintiff's property was damaged in a fire caused by the ignition of a maritime flare during the search – Conflicting versions – Whether the Galante principle applies – Whether the

plaintiff has discharged the onus of proving negligence on the defendant's version -
Whether the *res ipsa loquitur* principle applies

ORDER

The plaintiff's claim is dismissed with costs including the costs of the postponement of
8 November 2024 (scale C).

JUDGMENT

PANGARKER J

Introduction

[1] On 22 October 2010, the plaintiff's immovable property together with its contents were damaged in a fire which he alleges was caused by the members of the Metro Police, at all material times employed by the defendant, the City of Cape Town. The plaintiff caused a Summons to be issued in September 2013. The action was defended by the City and after various procedural steps, eventually came to trial in September 2024, approximately 14 years after the incident and 11 years after the action was instituted.

[2] The parties agreed that liability and the merits were separated from quantum. At the commencement of the trial certain housekeeping issues were eventually resolved: the parties agreed that the question of liability would include causation in that the plaintiff would have to establish which moveable items were on the property on the day of the incident and the extent of the physical damage thereto.

[3] In the heads of argument, the plaintiff's counsel indicated that the damages claim based on defamation related to an article published in *Die Burger* newspaper, was abandoned. In total, the parties called 8 witnesses. This judgment addresses the question of liability only.

The pleadings

[4] The pleadings are extensive. For the sake of brevity, the salient averments made in the pleadings follow below.

[5] In terms of his Amended Particulars of Claim, the plaintiff pleads that on 22 October 2010, his house at 2[...] T[...] Walk, Hanover Park (the property), was unlawfully entered and searched by Metro Police officers Sergeant Norman Absolon (Absolon) and Constable Deon Valentyn (Valentyn). The property was also used as a spaza shop. The Metro Police forced their way into the property and set off a flare in or near his immovable property, which caused the entire structure and its contents to catch alight. The entire structure was destroyed.

[6] At all material times, the Metro Police officers owed a duty to the plaintiff and public to protect and serve, to act with due care and diligence in the exercise of their duties and functions, to act lawfully and to protect the plaintiff's rights. The Metro officers breached their duty in that they failed to obtain a search warrant prior to entering the property, and without reasonable suspicion or just cause and without time being of the essence, disregarded the provisions of the Criminal Procedure Act 51 of 1977 (CPA) and forced their way into the plaintiff's home. They knew/should reasonably have known that their actions were unlawful and/or negligent and/or in breach of the CPA.

[7] Furthermore, the officers' duty of care extended to them protecting the plaintiff's property and not setting off a flare in his home without just cause. In this regard, they were reckless and/or negligent as they brought a flare into the plaintiff's home. The consequences and damage flow naturally from such conduct.

[8] The plaintiff pleads that a flare is a signal device not suitable for police action in a residential home. It contains dangerous explosive and/or ignition material, specifically designed to resist dousing and to burn at extreme temperatures, facts which were reasonably foreseeable by the officers. They could have foreseen that bringing a flare into the plaintiff's property created a fire hazard and the accidental/intentional/negligent activation of the flare could cause damage to property and persons.

[9] The Metro Police failed to observe safety regulations and/or standard procedures and ignited a flare in a residential home, alternatively, they caused to set it off in violation of regulations, common sense and/or safety guidelines. The police officers knew or should reasonably have foreseen that the plaintiff's property may ignite should a flare be activated within the confines of/near a residence or home.

[10] In addition, the plaintiff pleads that had the officers complied with their legal duties (as described above): (i) they would have obtained a search warrant prior to the date of the incident; (ii) would not have brought a flare into the plaintiff's property nor ignited it in or near his home; (iii) would not have caused the damages as pleaded¹; and, (iv) would not have destroyed the sub-stratum of the plaintiff's business.

[11] As a direct result and consequence of the Metro officers' conduct and the breach of their duty of care and/or legal duty to the plaintiff, the plaintiff suffered damages in that the property, spaza shop and contents were partially destroyed; significant structural damage occurred; alternatively, the property and spaza shop were unfit for use; and the property could not be inhabited.

[12] The plaintiff pleads further that as a result of the incident, he suffers from general anxiety, restlessness, and sleeplessness for the reasons as pleaded in paragraph 6.3 of the Amended Particulars of Claim. Since the incident, he was unable to adequately support himself and his family, had to reside with his in-laws, rely on charitable donations and was no longer financially independent. He no longer trusted

¹ Para 6-12, Amended Particulars of Claim

the local police because of media articles depicting him as a drug dealer² and the defendant's representatives alleged that he was a drug dealer, that drugs were confiscated during the police raid, that seven people were taken into custody on the scene and that he (the plaintiff) ignited the flare.

[13] As a result of the damage sustained by the incident brought about by the defendant's employees, the plaintiff underwent psychological therapy, was treated for post-traumatic stress and was unable to continue the operation of his business.

[14] The plaintiff's total claim is for R2 500 000, made up as follows (summarised):

- (i) Restoration of the immovable property, being an estimate of the reasonable costs to restore it to its original form³;
- (ii) Damage to movable assets (including, inter alia, furniture, freezers, television sets) in the house, clothing, kitchenware, linen, plus stock value of the mobile spaza shop with goods;
- (iii) General damages for pain and suffering, emotional and psychological shock, distress, and post-traumatic stress.

[15] In its Plea, the defendant admits the identification of its officers Absolon and Valentyn. In respect of the incident on 22 October 2010, the defendant pleads that its officers executed a lawful search and seizure operation, and during the course of execution thereof, one of the officers unknowingly activated a flare which was concealed and/or stored amongst other objects in a dark room on the property, which caused the flare to ignite (on the property).

[16] The police officers attempted to extinguish the fire but were unable to do so. The fire services were dispatched to the scene and extinguished the fire on the property. The defendant admits that the fire caused damage to the property.

[17] Save for the above, the defendant denies that its officers were negligent and/or reckless as alleged by the plaintiff or at all. The defendant pleads that any injuries,

² This relates to the defamation claim, which is not addressed in the judgment, as the plaintiff's counsel indicated that the claim was abandoned.

³ The plaintiff relies on a quotation attached as MS1

sequelae and damages which the plaintiff allegedly suffered as a result of the incident are due to his sole negligence for the following reasons: (i) the plaintiff concealed and/or stored and/or permitted to be concealed/stored, a dangerous combustible material/object, the flare, on his property, in an unsafe manner; (ii) the plaintiff foresaw or should reasonably have foreseen that if the flare was concealed/stored on the property in an unsafe manner, it could be activated accidentally by a person in the property, with the result that a fire could be ignited, causing damage to the property or injuring persons; and, (iii) the plaintiff failed to adequately (or at all) store the flare in a safe manner on the property and/or draw the existence of the flare to the attention of the officers so that they could take appropriate steps to avoid accidentally activating it.

[18] It is pleaded in the alternative, and only if the Court were to find that the police officials negligently activated the flare, that the defendant denies that such negligence was the legal cause of any sequelae and damages which the plaintiff alleges he suffered because of the incident. In the further alternative, the defendant pleads contributory negligence on the part of the plaintiff.

[19] The defendant admits the Metro officers' legal duty to execute their powers, duties and functions arising from the various statutes/legislation as pleaded⁴. The remainder of the plaintiff's averments are denied, and he is put to the proof thereof.

[20] In the plaintiff's Replication to the Plea, he denies storing a flare in a dark room on his property, alternatively, had no cause to purchase a flare; his spaza shop did not sell flares, and he denies that the flare could have been ignited accidentally, whether it was a hand-held flare or a parachute rocket flare⁵. Furthermore, if the Court finds that there was a flare stored in the property, the plaintiff in any event pleads that it is conceded by the defendant, that the flare was stored in a dark room on the plaintiff's property and activated by the Metro Police officers. Thus, the sole reason for the ignition of the flare, was the officers' negligence by their activation of it.

⁴ See para 6.1 – 6.1.4, Plea

⁵ The procedures for igniting these flares, as pleaded in paragraph 3 of the Replication, are not recited herein.

[21] Lastly, the plaintiff pleads that even if the Court should find that a flare was stored on the property (which the plaintiff denies), the plaintiff owed no duty of care to point out a flare in a dark room on his property, given the safety measures applicable to flares, and the legal duty and duty of care of the defendant's officers to act circumspectly and with due deference to the safety of the plaintiff's property.

[22] It is denied that a reasonable man in the plaintiff's position could have foreseen that an inactive flare, which he was unaware of and which he avers the officers brought onto his property, could have been activated by a person, given the safety mechanisms incorporated in commercially available flares. The plaintiff denies that the flare, if stored or concealed in a dark room, posed a danger, thus activating the plaintiff's duty of care. Entering a dark room would require a greater measure of care from the police officers to ensure personal safety and safety of property. It is thus denied that the Metro police officers acted as reasonable police officers in the circumstances.

Fozia Williams

[23] Fozia Williams (Williams) is the long-time neighbour of the plaintiff, and at the time of the incident, lived at 4[...] T[...] Walk, Hanover Park. She testified in examination in chief that the night before the incident, she heard a massive bang that awoke her. The noise came from the plaintiff's house. She testified that there were "youngsters" in the plaintiff's house, one of whom was known to her by nickname "*Tand*". There were no vehicles pulling up or leaving the plaintiff's house during that evening.

[24] She left her house and stood at her gate. With reference to a photograph of the plaintiff's house and surrounds, taken by Williams from her position at her house⁶, she observed Metro Police officers loading some of the "youngsters" in their van. As for the conditions, it was very windy.

⁶ Exhibit A

[25] The houses are situated in what Williams calls a circle. Some officers were loading people from the plaintiff's house while the others walked across a tarred surface opposite the plaintiff's house.⁷ These officers, it was estimated, were about 15 to 20 metres from Williams who observed the scene from her gate.

[26] She testified that at that stage she was 44 years old and could hear well. She heard a sound and simultaneously saw an orange flame, which she believed came from the hand of an officer who had their arm stretched. the flame struck the small door of the plaintiff's property. There were four officers and a few seconds later, the plaintiff's house started burning. The officers requested hosepipes from the neighbours to extinguish the fire, but they tried in vain to extinguish the flames. The firefighters arrived on the scene and Williams contacted the plaintiff's wife to advise her of the incident and that the house was burning.

[27] By the time Janade Stemmet, the plaintiff's wife, arrived on the scene, it was approximately 04h00. Williams testified that Ms Stemmet entered the house and removed the remains of her dogs which perished in the fire. At the time, Williams was a member of the neighbourhood watch, and her husband was in law enforcement.

[28] Williams testified that there was a fruit and vegetable stall on the tarred and grassy pitch/island opposite the plaintiff's house. It did not obstruct the police from firing the flare into the plaintiff's house.

[29] In cross examination, Williams testified that the stall opposite the plaintiff's house, which is depicted as having a green net cover, was present on the day of the incident and had a net cover on top ⁸. The structure does not appear on Williams' photograph, Exhibit A. She testified that she heard a commotion from the plaintiff's house while she was in her bed. As the incident occurred more than 14 years ago, her memory was not that good. As to the conditions, she stated that it was neither dark nor light and that she went into the street because she heard children crying and shouting.

⁷ The point where Williams saw the officers shoot the flare is marked in red on Exhibit A, a point at the edge of the tarred pitch, bordering the road.

⁸ Exhibit C, p115

[30] When asked about the position of the Metro Police on the scene, she explained that the officers were outside the plaintiff's house, at point B⁹ where an officer fired the flare into the house. During her testimony, she became emotional due to personal and/or family circumstances.

[31] She testified that an officer in front of the plaintiff's house shouted at her to return to her house, but she did not comply. She stood at her gate, heard officers beat up the children but she did not observe the assault. Her testimony also does not disclose who the children were and whether this is a reference to people who were in the plaintiff's house at the time of the incident.

[32] Williams then observed the police van move out of the circle in Turflyn Walk. Officers came to point B after the van moved out of the circle, and one of the officers in the group fired a flare toward the plaintiff's house. It entered the small steel gate to the left of the plaintiff's property.¹⁰ Williams also confirmed that point B on Exhibit A¹¹ is the same as point B on Exhibit C, page 115¹².

[33] It was put to her that it was highly unlikely that the flare would travel through the green meshed stall on the pitch and into the small gate. The statements of Giovanni Cox and Deon Matthews, the plaintiff's¹³ nephews who were apparently in the house on the evening of the incident, were put to the plaintiff, specifically that they reported that Absolon discharged the flare inside the plaintiff's house. Williams' response was to deny their versions and insist that the flare was shot from outside into the property.

[34] Similarly, she denied the version which would be given by the defendant's witnesses including that of Constable Lizette Miller, who was stationed opposite the tarred circle¹⁴, that no flare was discharged by any officers from outside and into the plaintiff's property. She could not explain why, on her version, the police would cross

⁹ Exhibit C, p115

¹⁰ 87A

¹¹ A point which is across the tarred pitch, abutting the road.

¹² This is a point directly opposite the Plaintiff's house, where the tarred pitch starts. It is not the same as point B on Exhibit A.

¹³ Exhibit C, p86; p89-91

¹⁴ Muller was stationed at the point/area highlighted by the words "29 Turflyn" on Exhibit C, p114

from the plaintiff's house¹⁵ to point B¹⁶ and then shoot the flare into the house/property.

[35] Williams admits that when she called Ms Stemmet to inform her that the plaintiff's house was burning, she did not tell her that the Metro Police discharged a flare into their property. Approximately 2 to 3 days after the event, she relayed the events to the plaintiff and his wife.

[36] Williams was also confronted with the plaintiff's letter of demand addressed by the plaintiff's attorneys to the Executive Director: Safety and Security¹⁷. The attorneys indicate therein that the Metro officers discharged a flare (in the house) after forcing their way into the plaintiff's house. Williams once again insisted that the flare was shot from outside the house and she had no idea why the attorney would record otherwise. She made a state to *The Daily Voice* about the incident.

[37] Williams was not requested to make a statement about the incident to the police. She views Valentyn and Grove's version of events – that the flare was discharged inside the house – as a lie. Williams could also not explain why Metro officers would discharge a flare from outside the house into the property while their colleagues were inside the property. In re-examination, Williams testified that she never spoke to Mr Swarts, the plaintiff's attorney.

The plaintiff

[38] The plaintiff testified that he and his family lived at 2[...] T[...] Walk. He is a driver and hawker and operated his own business at the time of the incident. The spaza shop was downstairs in the two-storey house as depicted in the photographs and the property was registered in his name. The living quarters were upstairs, while the dining area, kitchen and additional rooms were downstairs. He also sold fresh produce from a stall opposite his house, situated on the tarred pitch. It had a covering

¹⁵ Point B on Exhibit C, p115

¹⁶ Point B on Exhibit A.

¹⁷ Dated 20 September 2011

made of green mesh and he explained that fruit and vegetables were packed in the stall in the morning, sold during the day and then removed at night and stored upstairs. The structure had a roof but one could see through the stall.

[39] On the night of the incident, the plaintiff and his family were not home. They attended a party at his brother's house in Muizenberg and slept over at his place. He testified that Bryan Lambert and Altino Adams, his employees, slept at his house. At about 02h00, he left his brother's house to collect clients from the harbour and drop them off in Khayelitsha, Bonteheuwel and other areas. It was while *en route* that he received a call from neighbours informing that his house was burning.

[40] When he arrived at his home, he saw that the property was still burning. His wife, who had slept over at his brother's place, arrived on the scene thereafter. He testified that he heard from Williams that the Metro Police had fired a flare into his property, and he accepted Williams' version of the events.

[41] The defendant's version, that the flare was inside the house and discharged during the police raid, was put to the plaintiff. He denied that he and/or his employees present in his house on the evening/morning in question, ever possessed a flare. The plaintiff also denied any knowledge of drugs found in his house and stated he never faced any criminal charges after the incident. He testified that the *guys* in the house were arrested by the Metro Police but were later released. His view was that his property was searched unlawfully.

[42] The plaintiff instituted an insurance claim with Outsurance in respect of his damaged property, but the claim was rejected and not paid out. The matter was referred to his previous attorney, Mr Hassan¹⁸. As a result of the damage caused by the fire, the entire structure was burnt and not liveable. The plaintiff and his family were forced to live with family members and struggled to make ends meet as his livelihood was materially affected because the spaza shop and content were also destroyed in the fire. The plaintiff stated that the incident affected him and his work, with the result that he sought psychological help.

¹⁸ Mr Hassan subsequently passed away

[43] The plaintiff was taken through the list of movable items in his property at the time and which he claims were destroyed in the fire. He clarified that they sold mainly cold chain products from the spaza shop, which was why there were so many refrigerators on his list of movable assets. The spaza shop brought in about R5 000 per month.

[44] The plaintiff testified that in 2012, Absolon visited him and apologised. He understood that Absolon had the flare which caused the fire to his property and consequently lost his job because of the incident.

[45] In cross examination, the plaintiff admitted to making two statements shortly after the incident: the police statement dated 25 October 2010¹⁹ and the statement to Outsurance dated 28 October 2010²⁰. He stated that various neighbours called him to inform him that his house was burning. The scene on his arrival was chaotic, and he had heard or someone told him that the Metro Police forced their way into his house and released a flare when they could not gain entry. It was put to the plaintiff that Williams' testimony was that she called him to advise that his house was burning, and not, as he testified, that the police could not gain entry to his house, thus they discharged a flare.

[46] His attorney's letter²¹ was confirmed to have been drafted on his instructions. Yet, he could not explain why there was a difference in the description of the incident in the letter and the description thereof in the Outsurance claim letter dated 28 October 2010²². To clarify, the letter of demand drafted by the attorneys indicates that entry to the property was gained unlawfully and a flare was released, while the Outsurance letter states that the Metro police were trying to enter the house, and released a flare into the house. The plaintiff was unable to provide a reasonable explanation for this discrepancy.

[47] In respect of the version that Absolon lost his job because of the flare incident, the plaintiff could not dispute the defendant's version that Absolon lost his job because

¹⁹ Exhibit C, p94-95

²⁰ Exhibit C, p108

²¹ Exhibit C, p112-113

²² Exhibit C, p198

of a firearm incident years after the fire incident. Furthermore, when he was questioned about why his house would be searched for drugs, the plaintiff's response was that he had no knowledge.

[48] As to the occupants of his house at the time of the raid, the plaintiff was confronted with his reply to the defendant's list of admissions wherein he admitted that Giovanni Cox and Alfonso Matthews were his nephews, yet in cross-examination he denied this relationship.²³ He also could not confirm that they were in his house at the time the Metro Police searched his property, and denied that he let Cox look after his residence while he and his family were away. He admitted that Cox and Matthews assisted his wife from time to time.

[49] It was put to the plaintiff that officers Grove and Absolon were armed with a search warrant²⁴. They received information that drugs and firearms would be delivered to his house on that evening, travelled to his property in a convoy, knocked on the small door²⁵ and was refused entry to the house by Cox. Metro Police officers arrived to open the larger roller door²⁶ and displayed the search warrant to Cox. The plaintiff testified that he had no knowledge of/could not respond to these statements. The plaintiff understood that there was no search warrant but conceded that he realised that there was a search warrant. It was apparent from his testimony that he subsequently lost contact with Cox.

[50] When it was put to him that there were contradictions in his case as to the discharge of the flare and that this rendered his testimony unreliable, the plaintiff's response was that he accepted the reports from his neighbours about the event as being correct.

[51] In respect of drugs found in a drain on his property, the plaintiff testified that he was not present at the time of the raid and therefore had no knowledge thereof. Counsel for the defendant pointed out to him that in his reply to the request for further

²³ It is accepted that the plaintiff's reply to the defendant's request for admissions was drafted by his attorneys. Pleadings bundle, p134

²⁴ Exhibit C, p42

²⁵ Exhibit C, p120 (photograph). This refers to the door on the left of the property. Williams testified that the flare fired from outside entered the property through this door.

²⁶ The large roller door is on the right side

particulars, he denied that any drugs were found on his property. He also had no knowledge of the findings of Warrant Officer Thandiswa Maria Ntloko, the SAPS forensic expert, who concluded that the items seized on his property during the raid were indeed drugs²⁷. He was also asked whether he had access to a flare, particularly as he drove fishermen to and from the harbour. He denied that he had access to a flare or that he had a flare in his house at the relevant time and never saw fishermen with flares.

[52] The plaintiff was questioned about a storage room or cupboard under the stairs in his house. In this regard, the statement of Nathan Miller²⁸ was referred to, particularly that Miller stated that Absolon discharged a flare into the storeroom under the stairs²⁹. I pause to point out that Miller is referred to in the plaintiff's response to the defendant's list of admissions as one of the persons who stayed at his property.³⁰ The plaintiff repeatedly stated that he was not present during the raid and explained that while there were rooms on the ground level of his property, he did not know of a storeroom. He also testified that the house plans were not exactly as indicated. It was put to him that Grove would also refer to a storeroom at or built into the knotty pine stairs, but the plaintiff continued to deny that there was any storeroom in his house under the staircase.

[53] The defendant's version was put to the plaintiff: that Grove would testify that Absalon was with him and that there was a storeroom under the staircase. The storeroom was dark and Absalon was standing in front, with Grove behind him while Absalon removed items from the packed storeroom and passed it backward to his colleagues. It was as Absalon was tugging at an item in the storeroom that Grove saw a light/illumination and the storeroom started burning. The officers acted with haste to attempt to extinguish the fire but were unsuccessful, hence the fire services were deployed to the scene.

²⁷ Section 212 CPA statement, Exhibit C, p 78-79

²⁸ Exhibit C, p93-95

²⁹ The reference in the statement by Nathan Miller is to a "*stoorkamer wat onder die trappe is*" – Exhibit C, p93, par5

³⁰ Pleadings, par 2.1, p134

[54] The defendant's counsel put to the plaintiff that on entry to the property through the small door as depicted on the photographs, there is a passage and facing the passage is another wall with a door. When one walked down the passage you would exit the passage through the door and turn right to enter the house or the spaza shop. To reach the staircase, one would have to turn left. The plaintiff agreed with this basic description.

[55] In respect of proof of ownership of the movable assets claimed, the plaintiff testified that the entire house and its contents had burnt and therefore he had no proof of ownership of the movable assets. In respect of a Harley-Davidson motorbike which is on his list of moveables, the plaintiff explained that this was a project he undertook to build up Harley-Davidson which he had purchased from a Mr. Lambert and he was working on it at the time his house was destroyed in the fire.

[56] In the plaintiff's list of items (lost or damaged), he allocates R100 000 damages for the spaza shop with goods. It was pointed out to him that in the Amended Particulars of Claim, the stock value of the spaza shop with goods is R200 000. Insofar as this discrepancy between the two figures was concerned, the plaintiff testified that the R 100 000 was for stock in the shop whereas the R200 000 as pleaded included the stock comprising fruit and vegetables from the stall opposite his house. In other words, R100 000 was attributed to the fresh produce as stock on hand. When confronted about the discrepancy and that he adjusted his evidence as he went along in the trial, the plaintiff seemed to direct the blame to his attorney.

[57] The plaintiff was questioned in detail as to the movable assets and furniture list and whether the items were present in the property prior to the fire. I do not summarise this testimony in view of the conclusion reached in the judgment.

[58] In re-examination, the plaintiff testified that his employees would sleep in his house and look after the house in his absence, one of them being Alfonso Matthews. He furthermore testified that on the evening of the fire, the family left Matthews in their

property. He did not know where Cox was on that evening. He confirmed that on the date of the incident, he was the owner of the property.

[59] The plaintiff admitted that he had previous run-ins with the law. He does not know Ronelle Fielies nor Nathan Miller and explained that Cox was a distant relative who assisted him now and then. Similarly, Dion Matthews and Brian Lambert also assisted the family. The plaintiff was never questioned about any drugs or explosives on his property. His house was mainly furnished in wood and most of the woodwork caught alight.

[60] Regarding the structure in front of the plaintiff's house, he testified that it served as a fruit and vegetable stall on the night of the incident, it was uncovered. On the Court's questions, the plaintiff testified that the person who was left in charge of the house on the evening of the raid was Altino Adams. Following on from the Court's questions, the plaintiff was questioned about the discrepancy regarding Altino Adams and Alfonso Matthews being left in charge of the property. He testified that he could not say if Adams left Matthews in charge of the property.

Janade Stemmet

[61] The witness is the plaintiff's wife and shared the property with him and their children. She confirmed that she was not present on the evening/morning of the police raid and corroborates her husband's version that they were in Muizenberg and had slept over at his brother's place. She received calls from various neighbours informing her that their house was burning. She testified that Adams was left in charge of the house that night and that he slept at the house when they were away.

[62] She also corroborates the plaintiff's version that she ran the spaza shop in the smaller section of the property and that the outside stall was used for the sale of fruit and vegetables. In this regard, she also corroborates the plaintiff's testimony that the

stall was packed with produce in the morning, and that remaining fresh produce was removed in the evening and packed inside the property. The green cover netting provided shade for the fruit and vegetables.

[63] Insofar as the interior of the house was concerned, she also confirmed that large parts of the property were furnished in wood, that the stairs were made of knotty pine and closed, and under the stairs was a tiled floor. This area led to the kitchen and living room and there was no structure or store cupboard under the stairs. With regard to movable assets, Ms Stemmet testified that there were six refrigerators: two on a balcony, two in the shop and two in the kitchen. The police did not question her about drugs nor firearms.

[64] In cross-examination, Ms Stemmet was questioned in detail as to how, on her version, 4 000 pockets/units of vegetables could be packed to the ceiling inside the upstairs room in the property overnight. She eventually conceded the room's dimensions³¹, which the defendant's counsel put to her, would not be sufficient space for all the fresh produce she alleged it contained or could be fitted in but insisted that all the fruit and vegetables could be packed in this area.

[65] Ms Stemmet was questioned about her statement³² that several other people lived in the property, and that it contradicted her oral testimony that these were people who assisted her to run the tuck shop. Her version was that they did not live in the property but merely slept over occasionally.

[66] Ms Stemmet testified that Altino Adams was deceased. Matthews would sleep over at their place if they allowed it and she had no input as to whether Grove would say that Cox opened the door for the Metro Police. Ms Stemmet did not know Nathan Miller, Ronelle Fielies nor Deon Matthews. Furthermore, Mr. Lambert had also passed away. It was put to Ms Stemmet that the plaintiff referred in his response to the defendant's request for admissions and inquiries, that several people stayed on the property including Nathan Miller and Brian Lambert.

³¹ 5.5mx3.5mx2.5m

³² Exhibit C, p183

[67] She denied that there was a storeroom or cupboard under the staircase. She testified that Altino Adams smoked drugs but not in their property. On Grove's version that drugs were found in the house together with R570, she testified that she had no knowledge of the drugs as she was not home on the day of the incident.

[68] The witness testified that the cover of the stall was removed in the evening. The remainder of her testimony related to the stock and purchase of stock for the tuck shop, that the proof of purchases in respect of stock had also been destroyed in the fire and the volume of fresh produce which was capable of being packed in the room depicted on Exhibit B.

[69] It was put to Ms Stemmet that Grove would testify that he walked through the house and searched for drugs but only saw containers with sweets and cool drinks and not fresh produce like fruit and vegetables packed ceiling-high in an upstairs room. Ms Stemmet corroborated her husband's version of employment as a driver, and that he collected fishermen.

[70] She had no knowledge of a flare and when she arrived on the scene, the house was burning and the emergency and fire services were already in Turflyn Walk. Ms Stemmet was also informed that the Metro Police had fired a flare or that a flare went off, which resulted in the house being gutted by a fire. When she arrived on the scene, the arrested persons were not present.

[71] It was put to Ms Stemmet that on the version of Williams, the police shot the flare from outside into the house, through the small door which would mean that the flare would have had to travel down the passage, which is abutted by a small wall, and then turn right to enter the living area. The witness responded that there was a window and that the flare could have travelled through the window. Her view was that the version of her neighbour was believable. She also considered the structure opposite the house, from which the fruit and vegetables were sold, as not being an obstruction.

[72] In re-examination, she maintained that there was no cupboard under the stairs. The kitchen was close to the stairs and was an open-plan style kitchen.

Wayne Siebritz

[73] The last witness in support of the plaintiff's case was an independent labour consultant and the plaintiff's brother-in-law. He testified that he visited them frequently prior to the incident. He testified as to the layout of the plaintiff's property, the plaintiff's business activities, the movable assets in the property as well as that the Harley-Davidson was being built up.

[74] Notably, in respect of the staircase, his testimony was that the stairs were not big enough to have a room or cupboard underneath. He got to know about the incident and assisted the plaintiff with the insurance claim. He further advised the plaintiff to approach the insurance ombudsman after his claim was rejected.

[75] In cross examination, the witness also confirmed that stock was packed out in the stall opposite the plaintiff's house and then removed and placed in the property at night. He also denied the defendant's version that the green netting would be left on the structure overnight as in his view it would be removed or stolen. Some stock would be packed in the passage, some in the existing living room and some in the shop. He could not confirm that stock was packed in the room as depicted on Exhibit B. As for his visits to the plaintiff's property, he testified that he visited the property occasionally on weekends or holidays.

[76] Siebritz was questioned about the content of the property³³. He testified that at the time, the plaintiff had multiple flat screen televisions which were situated around the house. When confronted with the photographs of the plaintiff's bedroom taken during the period between May to October 2010³⁴, the witness's testimony was that the television could have been moved. He also testified that helpers or workers at the shop would occasionally sleep over at the house, thus corroborating the versions of the plaintiff and his wife that people indeed slept over in their house. This concluded the testimony for the plaintiff's case.

³³ With reference to Exhibit C, p128

³⁴ It shows that there is no television present

Sergeant Absalon's statement

[77] Prior to calling the defendant's witnesses, it was placed on record that Absalon, who featured largely in the incident, had passed away. He had deposed to a statement shortly after the incident on 22 October 2010. The defendant's counsel informed the Court that the defendant would not be proceeding with an application in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988 as the plaintiff was not willing to agree to the admission of the statement.

[78] The plaintiff's counsel took instructions and placed on record that Absalon's statement could be admitted into evidence, however, the plaintiff did not admit the truth of its content, nor the weight attached to the statement's content. However, it was clarified that the defendant's counsel could ask questions in respect of the statement of other witnesses. The admission of the statement is addressed below.

Inspector Llewellyn Grove

[79] At the time of testifying in the trial, Inspector Grove had worked for Metro Police for 19 years and 5 years for law enforcement. In 2010, he held the rank of a Sergeant. He was involved in crime prevention duties and was working with his late colleague, Sergeant Absalon at the time of the incident. Absalon received information from informers that a shipment of drugs and ammunition would be received at the plaintiff's property on 22 October 2010. The property was known to them as they had conducted previous raids at the plaintiff's property.

[80] Armed with his information, the two officers approached Philippi SAPS and relayed the information to Lieutenant Colonel Lang who prepared an affidavit in support of an application for a search warrant³⁵. The affidavit was presented to the

³⁵ Exhibit C, p59-60

Station Commander, Lieutenant Colonel Sevasi who issued a search warrant in terms of the Criminal Procedure Act 51 of 1977 (CPA).

[81] Grove explained that after obtaining the search warrant, the Metro Police had a briefing early in the morning with Lang and Sevasi. The uniformed members proceeded in a convoy to the plaintiff's residence. Grove confirmed that the property is as depicted in the photographs in Exhibit C. The police parked close to the corner of Turflyn Walk, on the left side of the plaintiff's property. The other vehicles parked behind them.

[82] Grove testified that Absalon carried a search warrant attached to a clipboard and proceeded to the plaintiff's house. They knocked on the solid gate and Cox opened a peephole and was requested by Grove to open the door but failed to comply. The officers knocked again and there was no response. They opened the roller door and asked Cox to open the small door which he did. Grove noticed a shelf containing cool drinks as well as a few refrigerators. The officers then entered the premises.

[83] Grove testified that they entered at the small door, and that there was a wall in front of them in the passage and on the right side of the wall was a door. He explained that there was a door dividing the tuck shop from the main residence. On the left-hand side there was a structure or frame of a motor bike. Straight ahead was another door³⁶.

[84] Cox took Grove and Absalon to the yard behind the house where, upon searching a drain, Cox removed a transparent packet containing R570 cash as well as packets of methamphetamine, otherwise known as "tik". The officers were then escorted upstairs where they found Alfonso Matthews and heroin, "tik" lollies and dagga/cannabis. Cox informed Grove and Absalon that there were drugs hidden under the staircase and they proceeded to the staircase. The staircase is made of knotty pine and closed off. It seemed as if there was a storage place hidden or closed by a knotty pine door.

³⁶ It is unclear exactly how many doors follow off the passage but, on my understanding, it seems from the evidence to be at least 3 doors.

[85] Grove testified that the area was dark and Absalon proceeded to remove crates, an old vacuum cleaner, paint tins and passed it on behind him to Grove. This was then passed on further to the officers behind Grove. Absalon pulled out a hose pipe and shortly thereafter Grove heard a sound and suddenly a light went off in the storage space/room, and the area caught alight. The officers were unable to extinguish the fire despite attempting to use hose pipes and buckets of water to douse the flames. Some or all the occupants were arrested in relation to the drugs, taken to Philippi police station and the drugs and money were seized and placed in forensic bags.

[86] Counsel for the plaintiff put Williams' version to Grove in cross-examination. Grove testified that it was highly impossible that the flare was fired outside the property because Metro Police are not issued with flares and flare guns. Secondly, he testified with reference to the structure on the centre island, that it was mounted to the ground, approximately 2 metres high and could be 3 to 5 metres in diameter. He testified furthermore that the speed of the flare would indicate that it was highly unlikely that it could be shot over the green structure and would have to follow a path of angles and curves for it to have entered the small door as testified by Williams.

[87] Grove was questioned as to whether he saw boxes of fruit and vegetables packed to the ceiling in the small room as indicated in Exhibit B. He testified that he did not see that quantity or volume of fruit and vegetables and had it been packed to the ceiling, it would have attracted his attention because he would have searched the area. He denied the plaintiff's version that there was stock worth approximately R100 000 in the spaza shop at the time they executed the search.

[88] Grove was questioned as to the content of the search warrant and why the plaintiff's name did not appear on it, and he testified that he did not apply for it and that it was issued to Absalom. He denied the plaintiff's version that Absalom stated to his colleagues that they should burn the house down. It was also suggested during cross examination that drugs could have been planted but Grove maintained that the officers did not have drugs. Furthermore, as for the parade protocol prior to a search, he stated that it was not a requirement for the police to search each other, but he nonetheless admitted during cross examination that he did not know if officers planted

drugs on the premises. He confirmed that the plaintiff, as the owner of the premises, was not present at the time of the incident.

[89] The arrested persons were removed and taken to Philippi police station and the other officers were left in charge of attending to the fire and the scene. He was questioned as to why he did not arrest the plaintiff as drugs were found on the scene and the plaintiff was the owner of the premises. Grove responded that were he to have arrested the plaintiff, there would have been questions as to the arrest. At that stage, he could not link the drugs to the plaintiff; however, Cox had led them to the drugs. He had no knowledge as to whether Cox was prosecuted.

[90] Counsel's statement or instruction that the witness knew that the drugs were never found on the plaintiff's property, was denied. Grove admitted that he and Absalon had torches on them and responded that the area where they stood at the storeroom was a narrow area. Furthermore, that Absalon used both hands to unpack items and could not remove a vacuum cleaner with one hand in the circumstances. Absalon passed on a crate, vacuum cleaner and hose pipe in a small, congested area. He reiterated that he heard a sound and saw a red light which went forward and into a corner. It was put to him that Absalon could have had a flare (on his person) and Grove's response was that he did not search Absalon and was unaware of the size of a flare.

[91] It was put to Grove that the defendant's expert report stated that the flare was used for safety of life at sea and Grove accepted this opinion. He had no knowledge of the range of a flare. He testified that Absalon was not burnt and that the flare did not ricochet in the confined area of the storeroom. He also persisted that he did not see the flare. It was also put to him that as he could not see the flare he thus could not see Absalon's hands and the witness confirmed that the statement was correct. He explained that Absalon had his back to him, but he passed items on to him.

[92] In respect of William's version that the flare was fired from outside into the house, Grove maintained that if that was the case, then the officers' lives would have been in danger as they were inside at the time. Neither Absalom nor Grove were burnt buy a flare.

[93] Grove did not search the small room referred to in Exhibit B and did not see fruit and vegetables stacked up to the ceiling anywhere in the house. He testified that the area under the staircase was enclosed and that he did not see a balcony. Grove testified that the entire staircase area was covered in knotty pine and the items removed from the small area were handed to officers who stood behind him. These items were then placed in the lounge.

[94] The witness also testified that he had made notes of his observations in the house, referencing his observations. He was queried as to the whereabouts of his pocketbook/notes of the incident and explained that the incident had occurred in 2010 and that it should be held in the Metro Police/City's statistics office.

[95] He denied that the green mesh cover of the stall was removed at the time. He testified that whenever patrols were done in the area the green net would cover or provide shade for the stall.

[96] Counsel for the plaintiff put to Grove that the plaintiff denied that the flare was his and he had no connection to the sea except to transport fishermen. Grove was adamant that the officers did not bring a flare onto the premises and that it must have been present on the premises. He did not have a flare and was of the view that a flare would have juttled out if, for example, Absalon had carried the flare on him. He testified that Absalon wore a combat uniform. It was put to him that Absalon could have concealed a flare under his jacket, and the witness did not deny this.

[97] According to Grove, the plaintiff's property was a known drug outlet. It was put to him that burning the house down would be a permanent solution to the problem which the house posed but according to Grove that would not be a solution. He relayed that on the way to the police station (after the incident) he and Absalon spoke of the incident, and the latter informed him that he had pulled a string or what he thought was a hose pipe in the confined area where he was removing items. It was furthermore put to him that if they (the metro Police) pulled out something in the dark, they could damage it. Grove responded that it was not their intention to do so.

[98] Grove reiterated that Absalon required both his hands to remove the items from the storeroom, which was packed. He therefore could not use a torch and was handing items to Grove who took it on. These items were placed in a more illuminated area. It was also put to him that Absalon could have held a torch in one hand and removed items with the other. Grove explained that the items were placed in an illuminated area as the kitchen is an open plan. There were no light switches in the area under the staircase or near the staircase, the door swivelled but there were light switches in the lounge or kitchen area.

[99] As for the prosecution of the arrested occupants of the house, Grove stated that the Metro Police had no oversight in respect of prosecutions. He had found drugs in Matthews' possession and Cox was the person who pointed out the drugs in the property. On the court's questions, Grove testified that the arresting officer for Cox and Matthews, was Absalon and that the Metro Police were not issued with flares.

[100] While counsel put the experts report regarding the operation and discharge of flares to Grove, Grove had an idea that flares are discharged via an object similar to a firearm. However, while he did not argue with the expert's view, he nonetheless persisted that on the day he did not see the flare.

[101] On the issue of the use of torches, Grove stated that had he stood where Absalon stood, he would probably have shone a torch to identify items and had a torch been used, the calamity might not have happened.

[102] I point out that during cross examination of Grove, counsel for the plaintiff indicated an intention to bring an application in terms of section 3(1) of the Law of Evidence Amendment Act to admit the statement of Alfonso Matthews, who was not called as a witness. The aim was to put to Grove that certain statements were made by Absalon in his presence. There was an objection to the admission of the statement, and it later became apparent that it was uncertain whether Matthews was deceased or not. The particular aspect stood down for the plaintiff's attorney to obtain an instruction. However, this aspect was not addressed any further and remained unconcluded. For purposes of this judgment the statement of Alfonso Matthews is accordingly not considered.

Constable Lizette Miller

[103] Constable Muller is a senior constable with more than 25 years' experience in the Metro Police. She was present on the day of the incident and stationed on the outer perimeter as depicted in the photographs. The purpose was to observe and to prevent anyone leaving the plaintiff's premises. She was in full uniform and in a marked vehicle and she stood at the side of the road along the circle. At the time it was closer to 05h00 and dark. She observed officers entering the house and after a while saw smoke and heard a commotion. Miller heard people call over the radio to alert fire services that there was a fire and she had no other involvement except going to the police station and making a statement.

[104] Williams' testimony was put to her, that the flare was fired from outside by and officer(s) into the plaintiff's property. Miller testified that she never observed any officer discharging a flare into the house. No officers had come out that far; there was a structure in the centre island, and she had a clear view of the property. According to her, the structure was closed.

[105] In cross examination Miller stated that she did not recall hearing any screaming, but she heard a commotion of people running out as well as noise over radio. She did not hear children screaming and she did not know Williams. She confirmed that given the positioning of Williams, she (Miller) was even closer to the plaintiff's house than the neighbour.

[106] She was clear that she did not see any officer fire anything from her position and she had a clear view from where she was standing. She was also not alone and had a partner. Had she heard any children screaming she would have reported it. She was not part of the search warrant group, they all had torches and each officer had a duty to check if his or her torch was working. She also testified that it was the duty of the Sergeant in charge to check at a parade if anyone was carrying a flare but she did

not witness Absalon carry anything. She heard afterwards that it was a flare that caused a fire in the house.

Sergeant Deon Valentyn

[107] Sergeant Valentyn was the third witness for the defendant and at the time of his testimony he had more than 23 years' experience with the Metro Police. He was not involved in obtaining the search warrant but was one of the officers who was involved in the search for drugs and firearms at the plaintiff's premises. He confirms and corroborates the testimony of Grove in respect of the convoy, that entry to the property was first denied and thereafter, Cox opened the small door to allow the officers entry to the property. In addition, Valentyn corroborates the version of Grove as to the lay-out of the property upon entry thereto.

[108] Valentyn's observations were that in or near the spaza shop, there were a few bags of chips and containers of sweets, as well as refrigerators which seemed relatively empty. He did not enter the room referred to in Exhibit B but testified that he did not recall seeing fruit and vegetables packed to the ceiling to the value of R100 000.

[109] Valentyn's description of the wooden staircase and the small storage area under or along the staircase corresponds with the version of Grove. Significantly, he testified that he was standing next to and behind Absalon who was busy taking a hosepipe, paint cans and more from the storage area and that Grove also stood behind and near to Absalon. He testified that he saw sparks, heard a 'swish' sound and then saw flames. At the time, he did not know what was happening and assisted with trying to extinguish the fire. This area was not lit up but Valentyn's torch provided illumination for Absalon while he was removing items from the small storeroom.

[110] After the incident, Valentyn deposed to an affidavit³⁷. Valentyn denied that Absalon stated during the search that they should burn the house down. He also

³⁷ Exhibit C, p70-71

confirmed Grove's testimony that occupants were arrested and that one of the occupants informed them that he could take them to a place where drugs were kept and pointed out the storeroom under or built into the staircase. Valentyn denied the plaintiff's version that no drugs were found on his property.

[111] As for Williams' version regarding the discharge of the flare, Valentyn was firm that her version was not true and that the fire started in the area where Absalon was searching.

[112] In cross examination, the witness was asked about whether there was a parade prior to the search. He testified that he would not say that the officers were searched prior to the assignment at the plaintiff's property, but they were informed that they would have to conduct themselves properly. He was questioned about the charge of possession of unauthorized explosives³⁸ and his testimony was that Absalon realised that the fire was caused by a flare. He admitted that there was an assumption that the flare is an explosive.

[113] Valentyn was questioned about Absalon's search and the use of a torch in the area under/near the stairs. It was put to him that Absalon did not use a torch, which Valentyn confirmed but stated that he was asked to use his torch, which he did. It was then suggested to him that he had volunteered the information without being asked to use his torch. Valentyn's response was that Absalon could not use a torch at the time because he used both hands to remove items from the packed storage room full.

[114] Valentyn was persistently questioned about his positioning in the confined area and explained that he was standing next to and slightly behind Absalon and that Grove was standing in a similar position. He denied standing behind Grove. Items were handed to him, and he maintained that Absalon used both hands and as far as he was concerned, Absalon could see the items he removed. He denied having discussed his testimony with Grove and testified that after the incident, the police had a debriefing, and the officers were speculating as to what had caused the fire. He also testified that

³⁸ Exhibit C, p81. It is unclear who completed and signed this document.

water did not extinguish the fire. Counsel for the plaintiff put it to Valentyn that a flare burns underwater but Valentyn did not know this.

[115] Valentyn testified that Absalon took care during the search and was not reckless. He testified that items were also handed to another colleague and that he could also see the area where Absalom was removing items from. According to Valentyn, the officers knew that they were searching for dangerous items such as firearms and ammunition. The confined area was full of junk, and he did not see a string.

[116] It was put to Valentyn that if Absalon had taken more time and more care, he would have seen the string (presumably attached to the flare). Valentyn did not know. He was not with Grove and Absalon the whole time so did not know which of the occupants pointed out where the drugs were.

[117] As for Williams' version that the flare was fired from outside the house, the witness disagreed with her and insisted that the fire had started inside the house while they were busy searching the storeroom area and he did not see a ricochet of the flare. He heard a swoosh sound and then saw flames. In response to persistent cross examination, Valentyn testified that he did not know how a flare reacts/behaves when it is set off.

[118] Valentyn testified that he walked around the house but not into every area and he did not see fruit and vegetables in the property. Valentyn confirmed Grove's testimony that occupants of the house were arrested, and he could not provide enlightenment as to the charges. He did not inspect furniture nor investigate the upstairs section of the property. He testified that his task was to accompany Absalon to search the area under the stairs in the confined area it was Absalon, Grove, himself, another officer³⁹ and one of the arrested people.

[119] Aspects regarding the position of Valentyn in relation to Absalon during the search of the storeroom were clarified during the Court's questions. He explained that

³⁹ The colleague subsequently passed away

they were positioned in a “V shape” with Absalon and he was behind and next to Absalon. There were no shelves in the area and there was a lot of what he described as “junk” lying on top of each other. The area within which they could move was approximately 1.68 metres high with a width of 1.3 to 1.5 metres and length or depth inward of approximately 1.5 metres. He explained that the stair incline played a part in the lack of spaciousness of the area and the room to move.

[120] The area was full of items, and he was closer to Absalon than Grove was because he was holding the torch. His description as to the area, which was made of knotty pine and a swivel door which opened outward, corresponds with the version of Grove. Valentyn testified that he stood on Absalon’s left while Grove was positioned more toward a wall. He confirmed that in his statement he indicated that the area was very dark, and he did not mention a torch. He denied that his version in the statement was incorrect or deviated from his testimony.

Captain Tandazwa Maria Ntloko

[121] The captain was in the police service for 20 years and she had received the case in 2011. She is a forensic analyst in SAPS, confirmed she had performed her official duties and verified the content of her section 212 statement⁴⁰. The evidence bags were sealed and when she received them from administration, the seal numbers corresponded and she was satisfied of the proper chain in respect of the evidence bags. She testified regarding the testing of the items found in the evidence bags and her findings as a forensic expert.

[122] In terms of the captain’s findings, the exhibit material contained methamphetamine (tik), heroin, cannabis, and methaqualone, while the remaining evidence bags contained glass pipes and R570 cash. After analysis, the exhibit material was sealed again and securely archived. She was never called to testify.

⁴⁰ Exhibit C, p78-79

Ownership of property

[123] The plaintiff does not plead, that he was the owner of the immovable property at 2[...] T[...] Walk, Hanover Park. He testified that the property was registered in his name and his attorneys' letter of demand asserts that the address is his place of residence/house. No documents in the form of a copy of the Title Deed were discovered. The Plea makes the averment that the defendant has no knowledge and puts the plaintiff to the proof that he operated a business from the property.

[124] In addition, it was pointed out that the search warrant did not refer to the plaintiff by name but rather referred to the owner of 2[...] T[...] Walk. While the issue of the plaintiff's ownership is raised in the heads of argument of the defendant, and it is correct that proof of ownership in documentary form has not been made available, the evidence considered holistically, leads me to accept that the plaintiff was indeed the owner of the immovable property at 2[...] T[...] Walk.

[125] The reasons for the above view are as follows: (i) the testimonies of Williams and Ms Stemmet corroborate the plaintiff's version that he was the owner of the property; (ii) the search warrant, while not mentioning the plaintiff by name, was directed at the plaintiff and 2[...] T[...] Walk; (iii) the testimonies of some of the defendant's witnesses (Grove and Valentyn), indicate that the plaintiff and the property at 2[...] T[...] Walk were known to the Metro Police due to prior raids and interaction on the property between the plaintiff and law enforcement, and, (iv) the correspondence exchanged between the plaintiff, his erstwhile attorney and Outsurance, his short term insurer, related to his claim for compensation pursuant to the fire, lead me to conclude that the plaintiff was indeed the registered owner of 2[...] T[...] Walk at the time of the incident.

[126] As for the movable items listed in the Amended Particulars of Claim, the plaintiff also did not provide by way of discovery, any documentary proof of ownership. The plaintiff and his wife testified that proof of ownership of the listed items was destroyed in the fire, and this is an acceptable, reasonable explanation in the circumstances.

[127] As to whether all these listed items/furniture and stock were proved to be present in the plaintiff's property at the time of the fire, is a separate question, to be considered only if the Court were to find that the plaintiff succeeds in proving that the defendant is liable for damages or that contributory negligence, as an alternative pleaded defence to negligence, is proved. In the event that the plaintiff fails on the liability aspect, there would be no need, in my view, to embark on an exercise determining whether the plaintiff proved that all the listed items as per his pleadings, were present in the property at the time it caught alight.

The search warrant

[128] The plaintiff pleads that the Metro Police unlawfully entered his property and searched it without a search warrant. The evidence of Grove and Valentyn, together with the Plea, paints a contrary picture: the Metro Police were armed with a search warrant on entering 2[...] T[...] Walk on 22 October 2010. The Plea avers that the search of the plaintiff's property was lawful.⁴¹

[129] In this regard, the following are material aspects:

- (i) a copy of the search warrant, made out to Sgt Absolon, by Lt Col Sevasi on 22 October 2010, forms part of the trial bundle;⁴²
- (ii) the plaintiff testified that the workers/helper(s) in his property at the time of the search, were not shown a search warrant.
- (iii) none of the suggested occupants of the plaintiff's property on the evening/morning in question, were called as witnesses, to wit, Alfonso Matthews, Giovanni Cox, Deon Matthews, Nathan Miller, Altino Adams and Brian Lambert⁴³, to shed light on the aspect of the search warrant,

⁴¹ Plea, par 5.1.1, p27

⁴² Exhibit C, p57

⁴³ Plaintiff's response to the defendant's list of admissions and enquiries in terms of Rule37(4), Pleadings, p134. It is noted that the plaintiff's version is that one of these occupants is deceased.

particularly as the Plea avers that the Metro Police had a search warrant and that the search was lawful; and,

- (iv) it is accepted that neither the plaintiff nor his wife was able to provide a first – hand account of the incident as they were not present when the defendant’s officers arrived on the scene.

[130] The result of the above factors, considered cumulatively, is that the averment in the plaintiff’s Amended Particulars of Claim that the Metro Police searched his property without a search warrant, cannot be sustained. The evidence clearly indicates otherwise.

[131] The plaintiff argues that the search of his property was unlawful due to the invalidity thereof, as the warrant merely referred to the owner while section 21(2) of the Criminal Procedure Act 51 of 1977 (the CPA) requires that the warrant clearly identifies the target. In this regard, the plaintiff relies on **Minister of Safety and Security v Sekhoto**⁴⁴ and **AK v Minister of Police**⁴⁵, to support his view that the search warrant was invalid and the ensuing search of his property, therefore, unlawful.

[132] Considering the plaintiff’s views on the search warrant, Chapter 2 of the CPA deals with search warrants, entry of premises, seizure and forfeiture and disposal of property connected with offences. Section 21(2) states as follows:

21 Article to be seized under search warrant

(1) ...

(a) ...

(b) ...

- (2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorize such police official to search any person identified in the warrant, or to*

⁴⁴ [2010] ZASCA 141 par [28]

⁴⁵ 2023(2) SA 321 (CC) para [59]-[60]

enter and search any premises identified in the warrant and to search any person found on or at such premises.

- (3)(a) A search warrant shall be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof at night.*
- (b) A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.*
- (4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant."*

[133] Section 21(2) makes it clear that the warrant obliges the police to seize the article referred to in the warrant, which entitles the said police to search any person identified in the warrant or to enter and search the premises identified in the warrant and to search any person found in the identified property.

[134] The first point to make is that the plaintiff refers to and relies upon paragraph [28] of **Sekhoto** which, according to the heads of argument, states that vague warrants violate statutory requirements. On reading **Sekhoto**, I point out that paragraph [28] of that judgment does not deal with search warrants, but with the discretion of a peace officer to arrest someone in terms of section 40(1) of the CPA. The latter section deals with arrests without a warrant.

[135] The plaintiff also relies on **AK v Minister of Police**⁴⁶, a Constitutional Court judgment to support and advance the view that the entry into the plaintiff's property, where the search warrant referred to Absalon only, rendered the search wrongful because it was procedurally incorrect or unfair. The terrible circumstances in **AK** involved the applicant who, in between flights for a business trip, went for a walk on the beach. During her walk, she was approached by an unknown male who robbed and threatened to kill her if she refused to accompany him. Fearing for her life, the applicant accompanied the man and in a horrific ordeal amongst the bushes, which

⁴⁶ Supra

lasted some 15 hours, the applicant was blindfolded and raped multiple times, by more than one male. She managed to escape and was assisted by a passer-by who subsequently took her to the police station.

[136] The applicant in **AK** sued the Minister of Police for damages arising from the incident. The searches referred to during the High Court matter involved a foot search, a K9 search and rescue and an aerial (helicopter) search of the beach and surrounds. The High Court was critical of SAPS, finding the search to lack co-ordination and communication, and that SAPS were simply going through the motions⁴⁷. The High Court eventually found the police to be negligent in respect of their searches and awarded damages in favour of AK. Subsequently, on appeal, the Supreme Court of Appeal (SCA) disagreed, and found that the High Court's findings could not be supported, thus effectively dismissing the applicant's claim.

[137] The Constitutional Court in **AK** referred to ***Mashongwa v Passenger Rail Agency of South Africa***⁴⁸ which expounded on the test for negligence in the case of an organ of State. In summary, the majority decision, with reference to ***Mashongwa***, emphasised that the test for negligence was that of a reasonable organ of State, which finds its basis or origin in the Constitution, as it requires of the organ of State to take reasonable measures to advance the realisation of rights in the Bill of Rights⁴⁹. The test, therefore, according to **AK**, and with regard to SAPS, was whether it acted reasonably in the circumstances and this is dependent on its obligations to prevent, combat and investigate crime, maintain public order, protect citizens and their property and uphold and enforce the law, which are the police's positive obligations in terms of section 205(3) of the Constitution. These principles would similarly apply to the Metro Police.

[138] Returning to the matter at hand, an important point to make is that the plaintiff's Amended Particulars of Claim do not plead that the Metro Police were armed with a search warrant which was invalid. Secondly, the plaintiff's case on his pleadings is not one of damages arising from an unlawful search and seizure, but damages arising

⁴⁷ MK, supra, para [20]-[21]

⁴⁸ 2016(3) SA 528(CC) para [40]-[41]

⁴⁹ AK, supra, par [70]

from the damage caused to his immovable and movable property. Thus, on the pleadings, no case is made out to advance the contention that the search was unlawful because of an invalid warrant.

[139] Thirdly, and even though the plaintiff's pleading is silent on a search warrant, it was raised in cross-examination of Grove and Valentyn that they were not authorised to be on the plaintiff's premises on the morning in question, as only Absolon was mentioned in the search warrant. This means that despite pleading no search warrant, during the trial the plaintiff attempted to expand his case, contrary to his pleading, by then suggesting that the search warrant was invalid.

[140] Furthermore, the criticism and belated attack on the search warrant in the plaintiff's heads of argument is certainly without merit when I consider the wording of section 21(2) of the CPA, read with the content of the search warrant. The section is clear: the search warrant authorises the police official to search any person identified therein or⁵⁰ to enter and search any premises identified in the warrant and to search any person found on the premises.

[141] This means, therefore, that where the specific person is not identified (for example, the person is simply referred to as "*the owner*"), but the warrant still authorizes an entry and search of an/the identified premises and search of anyone found on/in the premises, the warrant still complies with the prescripts of section 21(2) of the CPA. In the case of the search warrant which Absalon obtained from Lt Col Sevasi, the plaintiff was not specifically identified as the person to be searched but 2[...] T[...] Walk was identified as the premises to be searched and hence, in my view, the search warrant complied with the provisions of the CPA.

[142] To the extent that the validity of the warrant was raised during the trial, I am satisfied that it was a valid search warrant and that it conveyed that the search encompassed firearms, ammunition, drugs, stolen property and liquor (without a

⁵⁰ My emphasis

license or in excess of personal use). The search warrant need not have been drafted in an exhaustive or perfect manner⁵¹.

[143] In conclusion, the testimonies of Grove and Valentyn as to the application for and authorisation of the search warrant are accepted. Furthermore, Absolon was authorised to conduct the search, and the convoy of Metro Police officers who assisted him, pursuant to information received about drugs and ammunition due to be received/ delivered at 2[...] T[...] Walk, did not render the search unlawful. I, accordingly, find that the Metro Police members were engaged in a lawful search on 22 October 2010 at the plaintiff's property.

The flare: discharged from outside (the plaintiff's version)

[144] In terms of the parties' pleadings, both refer to a flare having been activated, which caused the fire in the plaintiff's property. The flare is thus the mechanism or cause of the fire. Before discussing the origin of the flare with reference to the evidence, it is necessary to say something about the plaintiff's criticism of the defendant in that it failed to call its expert fire investigator, Anthony John Hudson Young.

[145] This criticism is addressed in the parties' heads of argument, and the issue should be seen in the context of the pleadings, pre-trial agreements, and the evidence. The defendant delivered a Rule 36(9)(a) notice in November 2019 attached to which is Mr Young's curriculum vitae and his report regarding the house fire at 2[...] T[...] Walk on 22 October 2010. Mr Young was not called as an expert witness by the defendant and there is no indication or reference to him in the pre-trial Minutes. Despite this, and the matter being declared trial ready a considerable time prior to the first trial date in 2024, the Metro Police witnesses were questioned in cross-examination as to whether there was a ricochet of the flare in the confined area or storeroom where Absolon, Grove and Valentyn were searching on the day of the incident.

⁵¹ Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others 2008(12) BCLR 1197(CC)

[146] The plaintiff argues that the failure to call the expert should draw a negative inference from the Court. The basis for the submission is that it is improbable that a member of the public would store a maritime distress flare, used in sea emergency rescue situations, in an unsecured condition in their residence thus exposing it to accidental ignition or discharge. The further submission is that the risk that the flare may ignite on handling it raises the question as to how the ignition thereof could have occurred in the first place. Thus, the defendant's failure to call its expert⁵² leaves the Court with no explanation as to how the flare could have been discharged accidentally, without negligence on the part of the Metro Police.

[147] It thus means, so the argument goes, that if the flare could be ignited by applying force, friction or activating a trigger, then it signifies a lack of care by the Metro Police. The plaintiff's counsel submits, therefore, that the failure to call the expert amounts to a failure to rebut the inference of negligence and relies on ***Galante v Dickinson***⁵³, which states that in the absence of evidence from the defendant, the Court is entitled to select, out of two alternative explanations, the one which favours the plaintiff⁵⁴. In summary, this is referred to as the Galante principle.

[148] ***Galante*** dealt with negligence in a motor vehicle collision. The defendant's response to this submission is that the Galante principle applies to factual witnesses rather than expert witnesses. In ***De Maayer v Serebro; Serebro v Road Accident Fund***⁵⁵, the SCA referred to the Galante principle and its application in the following manner:

“[19] In the absence of any evidence from the insured driver who, though available, was not called, this Court was urged to apply the rule laid down in Galante v Dickinson 1950(2) SA 460 at 465 as follows:

⁵² Mr Young's report addresses various aspects related to a flare, including characteristics, ignition and behaviour.

⁵³ 1950(2) SA 460 (A) at 465

⁵⁴ At 465

⁵⁵ 2005(5) SA 588 (SCA)

'But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the case of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant.'

*(See also Marine & Trade Insurance Co Ltd v Van der Schyff 1972(1) SA 26 (A) at 37A-41A and cases there referred to; Jordaan v Bloemfontein Transitional Local Authority and Another 2004(3) SA 371 (SCA) paras [20]-[21].) As is apparent from the passage quoted, what is described as the 'Galante principle' applies only where the two alternative explanations as to the cause of the accident are more or less equally open on the evidence before the court. Where, on the evidence, there is an obvious explanation as to the cause of the accident which favours the defendant, and an unsubstantiated theory advanced by the plaintiff with no evidence to support it, it cannot be said that there are 'two alternative explanations of the cause of the accident which are more or less equally open on the evidence and the Galante principle does not apply. That is the situation in the present matter. On the evidence, the obvious explanation for the collision is that the third party did not keep a proper lookout and attempted to cross Katherine Street at a time when it was inopportune to do so because of the oncoming Sierra. Hillman's explanation as to how the collision occurred was discredited and there was no other evidence to suggest that the speed of the Sierra could have been a cause of the accident.'*⁵⁶

[149] From my understanding of these judgments, particularly **De Maayer**, the Galante principle would apply in a matter where there are two alternative explanations that are more or less equally plausible and acceptable on the evidence⁵⁷. For the reasons which become evident in the discussion which follows, I agree with the defendant's submission that the Galante principle finds no application in this matter.

⁵⁶ My emphasis

⁵⁷ See Neethling Potgieter Visser Law of Delict Seventh Edition, p162, FN 214

Two versions were placed before the Court, both involving the flare which caused the fire.

[150] In addition, counsel for the plaintiff submits that the Galante principle applies here in view of the defendant's failure to call its expert fire investigator as to how the flare could have been discharged and how it (could have) behaved in a confined space. The opposing argument is that the Galante principle applies to factual witnesses and not expert witnesses.

[151] During my research I have not been able to find any authority which specifically addresses this issue. I have found that all the authorities mentioned above, as well as others such as ***Jordaan v Bloemfontein Transitional Local Authority***⁵⁸ and ***Govan v Skidmore***⁵⁹, relate to evidence of factual witnesses which was not led or versions not put up during the trial which did not include expert witnesses.

[152] In view of this, the argument by counsel for the defendant is persuasive, but I am by no means concluding that the Galante principle could never apply where a defendant does not call an expert witness. The point to make is that the versions before the Court are not more or less equally open or acceptable on the issue of the discharge of the flare (and thus negligence), and it is on such basis that I hold the view that the Galante principle does not apply to the evidence presented in this trial.

[153] This brings me then to the divergent scenarios and explanations as to the origin of the flare. By "*origin*" I mean, how and where was the flare, which caused the fire that damaged the plaintiff's property, discharged or fired?⁶⁰ To be clear, the parties seem to have accepted on the pleadings that the mechanism of the fire was a flare and the matter is thus approached from this common cause perspective. As to how it ended up causing a fire to the plaintiff's property and where it was discharged, remained a dispute throughout the trial. It is also common cause on the pleadings that a/the Metro Police officer ignited the flare.

⁵⁸ 2004 (3) SA 371 (SCA)

⁵⁹ 1952 (1) SA 732 (N) 734

⁶⁰ As no expert was called, it is unclear whether "discharge" or "fire" should be used. I have used both words interchangeably.

[154] To commence the discussion, three important points must be emphasised:

- (i) Williams, the plaintiff's neighbour, is the only factual witness called by the plaintiff to give an account of the events and apparent actions of the Metro Police at 2[...] T[...] Walk on 22 October 2010.
- (ii) The testimonies of Grove and Valentyn that Metro Police are not issued with flares, remained constant.
- (iii) Absolon passed away and he made a contemporaneous statement after the incident⁶¹. On the latter aspect, the defendant's request that the late officer's statement be admitted into evidence in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988, was refused by the plaintiff.

[155] Williams' version is that the flare was discharged by a Metro Police officer outside the plaintiff's property, and that it entered the property through the small door on the left side of the building. The defendant submitted that Williams' version of a discharge/ignition of the flare outside is contrary to the Amended Particulars of Claim, which does not specifically plead a discharge of the flare outside the plaintiff's property.

[156] Having regard to the Amended Particulars of Claim, and on reading paragraphs 3 to 5.1 thereof, it becomes clear that the words "*The Metro police ... set off a flare in or near Plaintiff's home...*"⁶², are broad enough to encompass a factual scenario where "*near plaintiff's home*" may include a discharge of the flare outside the property in Turflyn Walk and/or on the tarred and grassy pitch which features in the photographs. In this regard, my view is that the omission to specifically plead that the flare was discharged or activated outside the house, is not detrimental to the plaintiff's case overall.

[157] The defendant's version is that during a search of the property for drugs, firearms and ammunition, Absolon, while removing and handing items over to Grove

⁶¹ Exhibit C, p67-69

⁶² Par 5.1, Amended Particulars of Claim

and Valentyn in a cramped, packed storage space built into the knotty pine staircase, pulled on an item, which caused a light to go off in the confined area, with the result that the area caught alight and the plaintiff's property consequently burnt.

[158] There are thus two diametrically opposing versions as to where and how the flare was activated, and given the material differences in the versions, it requires a consideration of which version is the more probable of the two. In respect of Williams' version, I agree that her testimony considered holistically, suggests that the Metro Police officer who fired the flare from outside the plaintiff's property, did so deliberately and/or with intent.

[159] In the case of mutually destructive versions, the approach in ***Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others***⁶³ as set out by Nienaber JA, as follows, should be adopted:

“On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. 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' 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

⁶³ 2003(1) SA 11 (SCA) par [5]

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."

[160] Applying the ***Stellenbosch Farmers Winery*** approach to Williams' version that the flare was deliberately fired by Metro Police from outside and into the plaintiff's property, I highlight certain aspects in the paragraphs which follow. On Williams' version, the Metro Police had rounded up and arrested the occupants in the property, placed them in an official vehicle, and thereafter the un-named officer fired the flare directly at the property and it entered through the small door of the property.

[161] Were this to be the case, then I must ask why it would be necessary to fire a flare into the property when the occupants were arrested, and police had already gained access to number 2[...] ? It is a logical question to ask, which the plaintiff has failed to answer. On Williams' version, it simply makes no sense that the Metro Police would, in the circumstances she described, discharge a flare into the house after access was gained.

[162] Following Williams' version to its conclusion, which necessitates drawing the necessary inferences from her testimony, it would mean that an officer deliberately activated and discharged a flare from outside, aimed it at the plaintiff's house, while some colleagues were still inside the property and with the intent to damage and/or destroy the property, evidence and potentially injure his/her colleagues. This scenario is highly improbable and far-fetched, to say the least.

[163] I fully agree with the submissions by the defendant's counsel as to the inherent improbability of such a scenario unfolding. In this regard, there is no suggestion on the evidence nor any submission as to why a Metro Police officer would wish to deliberately and /or recklessly fire a flare into a house still occupied by their colleagues who were busy performing official duties. Furthermore, even if one were to consider that the officers may have left the scene after the arrests, it would still defy logic that the defendant's members would, in full view of neighbours, fire a flare into residential property.

[164] As to the position where the flare was fired from, Williams' testimony was anything but clear and cogent. To illustrate, with reference to Exhibits A and Exhibit C⁶⁴, her "*point B*," being the place where the flare was fired from, are two different points, as referred to earlier. However, when questioned about the detail of her version, she testified that these positions were the same. This was incorrect and a clear contradiction.

[165] Furthermore, the probabilities are such that if the un-named officer fired the flare from point B as depicted on Exhibit A, which is the photograph provided by Williams, then his/her line of vision would in all likelihood have been obstructed by the fruit and vegetable stall directly in front of them, as it was located in the line of discharge if the flare was discharged horizontally, as Williams described.⁶⁵ .

[166] Even if, for argument's sake, the structure was uncovered and posed no material obstruction, it then begs the question why the officer, who intended to discharge a flare directly aimed at the property, would position themselves with a stall as a potential obstruction. This issue is also not addressed by Williams nor the plaintiff. Whether, if the officer aimed the flare in a horizontal manner, it would have travelled over the stall or ricocheted or struck it *en route*, is cause for speculation, especially as no expert evidence was led on the behaviour and characteristics of the flare in question.

⁶⁴ Page 115

⁶⁵ My view is that a finding on whether the stall was covered or uncovered on the morning of 22 October 2026, is unnecessary, particularly in view of the improbabilities in Williams' version.

[167] A further troubling aspect is that if the un-named officer was positioned at point B on Exhibit C⁶⁶, diagonally opposite the property and the white cars depicted on the photo, then they would be closer to the plaintiff's house and to the left of the fruit stall. The contradiction in Williams' testimony, as described above, remains, and I return to the same enquiry as earlier: why would a Metro Police officer discharge a flare into the plaintiff's property, after gaining entry and while some colleagues may still be inside the property? The plaintiff's submissions are silent on this red flag and in my view, it simply defies belief that an officer would knowingly and intentionally, if one accepts Williams' account of the events outside, embark on such a serious, reckless, and harmful action.

[168] The issues with Williams' version do not end there. From where she stood at her gate, it is in any event highly questionable whether she would have had a clear view of the front of the plaintiff's property, given that the fruit stall was located between her position and the front of the plaintiff's house. It must also be remembered that the incident occurred between 04h00 to 05h00, and according to Williams, it was neither dark nor light at that stage. Her version of having moved around, when pressed under cross examination, seemed to amount to an adjustment in her earlier testimony or uncertainty as to the actual events of the morning.

[169] Williams' version of a flare discharged outside toward the property is not recorded nor mentioned in any correspondence addressed by the plaintiff's attorney. She also did not make a statement to the police, as one would have expected from a neighbour and neighbourhood watch member at the time and she had no explanation for this. The plaintiff's reliance on *The Daily Voice* article wherein Williams made a statement to the press, does not serve as verification of her version, and particularly in view of the numerous improbabilities in her version that a flare was fired from outside the house. While Williams reported the detail of the incident to the plaintiff and his wife a few days after the incident, it is strange that the discharge of the flare from outside into the house, is not disclosed in the attorney's letter of demand in September 2011, nor in the pleadings.

[170] Furthermore, having regard to her testimony, inasmuch as the plaintiff's counsel criticized the defendant for failing to call an expert, the plaintiff nonetheless expects the Court to accept Williams' version that the flare was discharged horizontally to the ground, aimed at the plaintiff's property, travelled over the fruit stall, entered the small front door, travelled down the passage, through another door (or two), then toward to the living room/kitchen/stairs area where it then struck something and the property started burning. The version suggesting a ricochet of the flare is not corroborated. Put simply, Williams could not testify to the path which the flare followed, no occupants were called to testify and no expert witness shed light on the issue.

[171] Williams' version is littered with improbabilities and when viewed against the plaintiff's pleading alleging negligent conduct of the Metro Police, her version implies that there was no negligence but rather, a deliberate and intentional act by an officer who discharged a flare. While the discharge or ignition of the flare is pleaded in broad terms, the account of the events by the neighbour Williams is simply improbable.

[172] Williams was not a good witness. She was at times emotional, which I understand, given her explanation about family trauma and loss. Understandably, the incident happened 14 years prior so it is natural that her memory would fade and allowances are made for a lapse of memory given such an extended period from the date of the incident to the commencement of the trial. However, as discussed above, her account of her observations describes a scenario that is far-fetched and not favoured by the probabilities.

[173] There is a further problem with Williams' version that a flare was discharged from outside the property. Standing in direct contrast is the testimony of Constable Miller who was stationed outside the property at point A⁶⁷ on a planted verge, to the right of the plaintiff's property. This means that she was facing the grassy, tarred island/pitch opposite the plaintiff's property. Considering her testimony, which was factual, straightforward and based on her observations on the morning of the incident, I accept that Miller had a clear and unobstructed view of the tarred pitch and the fruit

⁶⁷ Exhibit C, p114

stall, the area opposite the plaintiff's property, the road and the property itself. She was therefore able to observe the entire scene which unfolded during and after the search.

[174] The plaintiff has, unfortunately, not held back on his criticism of Miller. However, considering her testimony and how she fared during the trial, I agree with the defendant's counsel that the plaintiff's criticism that Miller had "*institutional bias*" due to her lengthy career spanning 25 years, is unsupported and unfair. At no stage during her testimony had Miller exhibited anything remotely akin to "*institutional bias*."

[175] Furthermore, the added criticism levelled at her for having "*convenient amnesia*"⁶⁸ because she did not hear children shouting (as Williams testified) but heard radio calls for fire service assistance, is also unjustified. One must remember that the scene was busy and chaotic: neighbours were outside; there was a police convoy with at least 15 Metro Police officers on the scene, and occupants were arrested and placed in the Metro Police vehicles(s), so it would not be strange to describe the situation as a "*commotion*" as Miller did.

[176] In my assessment, Miller had a clear vantage point of the scene and would have seen if an officer stood on any of the two points (B) as depicted on the photographs, and discharged a flare, aiming at the plaintiff's property. Overall, Miller's testimony was logical and consistent. She maintained that she did not observe any officer fire a flare from outside.

[177] Having considered the above factors, and the improbabilities and inconsistencies in Williams' testimony, I conclude that she was an unreliable witness. Her version of a flare being fired from outside is not supported by any other oral or documentary evidence and while the plaintiff had the opportunity to call other neighbours and/or occupants of his house on the day in question, he failed to do so. There is accordingly no corroboration for Williams' account of events related to the discharge of the flare. In the result, her version that the flare was discharged outside the plaintiff's property by a Metro Police officer, is rejected.

⁶⁸ Plaintiff's heads of argument, p50

The flare: unknowingly activated in the plaintiff's property (the defendant's version)

[178] This leaves the Court with the defendant's version as testified to by Valentyn and Grove. The first point to make is that on its pleaded case⁶⁹, the defendant states that during the course of executing the operation pursuant to the search warrant, one of the officers unknowingly activated a flare which was concealed or stored in a dark room in the plaintiff's property, causing a fire to ignite⁷⁰. This pleaded version is supported and confirmed by officers Valentyn and Grove, who assisted and accompanied Absolon during the search and bore witness to how the fire started. Grove's version that Cox, one of the occupants, pointed out the area under the staircase/storeroom where drugs were hidden or placed, was consistent.

[179] At this stage, it must be recalled that Cox had already pointed out to Absolon and Grove that there were drugs and money in an outside drain. They were also taken upstairs where they found Matthews using/possessing/present in a room where heroin was found⁷¹. Valentyn confirmed during his testimony that an occupant was standing close to them while Absolon was busy packing out items from the storeroom and that he (Valentyn) had not accompanied his two colleagues on their inspection and search throughout the property. This account accords with Grove's version, though the latter witness's account was in more detail.

[180] In view of the evidence presented by the defendant's witnesses, which I accept, it follows that the reason why Grove, Valentyn and Absolon were at the staircase/storeroom area, was because Cox had led them to it or alerted them to its existence as an area where drugs were concealed. It is here, according to the defendant's witnesses, while Absolon was removing items from the packed room, that Absolon activated the flare, which then caused a fire. Valentyn and Grove described seeing sparks or a light, hearing a sound, and then seeing flames.

⁶⁹ Par 5.1.2, Plea

⁷⁰ My emphasis

⁷¹ The evidence is that Matthews was found with heroin.

[181] On the basic detail of their versions, neither Valentyn nor Grove were prone to material contradictions. They were cross-examined at length that it was in searching the confined and packed storeroom, that Absolon removed items such as paint tins, a vacuum cleaner, crates and a hosepipe, and pulled at something/an item, that they heard a sound and observed a sudden light, followed by fire. The impression from their testimonies is that the small storeroom was packed with an array of items of all manner and sizes. Valentyn had described the content of the storeroom as “*junk*.”

[182] The parties accepted that a flare was found on the scene and their pleadings are *ad idem* that a flare was the mechanism which ignited the fire. While the defendant’s counsel submitted that some of the occupants who deposed to affidavits also referred to Absolon discharging a flare inside the house and threatening to burn the house to the ground, I do not take these written statements into account in the assessment of evidence. None of the occupants who made statements were called as witnesses and there was no agreement between the parties that evidence in the form of affidavits could be admitted. The plaintiff also did not proceed with a request to admit Matthews’ affidavit in terms of the Law of Evidence Amendment Act.

[183] The position in respect of Absolon’s police statement is slightly different. In the statement Absolon explained that Cox took them to a dark room under a staircase. He searched the area which was packed with “*stuff*” and feared that there would be firearms. As he was busy removing the objects, one object was stuck and he pulled; the room lit up and the object “*went off*.”⁷² He states that the object appeared to be a flare.

[184] As indicated, there was no agreement regarding Absolon’s statement and its content, which amounts to hearsay evidence. The plaintiff refused to agree to its admission in terms of section 3 of the Law of Evidence Amendment Act because he disagreed with its content. As Absolon is deceased, the only applicable section to admit hearsay in the circumstances, is section 3(1)(c) of the Act.

⁷² Absolon statement, p108

[185] In respect of the provisions of section 3(1)(c) of the Act, I have regard to: the trial proceedings; the nature of the evidence (from both sides) as to the flare; that the purpose for which Absolon's statement is tendered is to confirm the versions of Grove and Valentyn and to support the defendant's pleadings; that Absolon's account of events as explained in his statement after the incident is of significance as it explains what transpired in the plaintiff's property and that the flare was in the storeroom/cupboard at the staircase; and, that the evidence is material.

[186] In view of these factors, it is in the interests of justice that Absolon's contemporaneous statement be admitted into evidence in terms of section 3(1)(c) of the Act. In order to determine the veracity and truthfulness of the content of his statement, a determination must be made as to whether the storeroom/cupboard under the stairs indeed existed, because its existence was placed in dispute by the plaintiff and his wife, and whether the versions of the three officers are corroborated.

[187] The plaintiff and his wife denied the existence of a storeroom while the defendant's version was that the storeroom was pointed out by Cox, it was part of or built into the staircase and made of knotty pine, with a door that swung outward. While the plaintiff's counsel emphasised that the plaintiff and Ms Stemmet consistently denied that there was such a room/cupboard, my view is that the plaintiff's testimony was at times, circumspect.

[188] For example, the plaintiff contradicted himself on whether Cox and Matthews were his nephews or not and having considered his testimony, it occurred that he could not decide whether they were nephews or not. This was contrary to the admissions made leading up to the trial wherein it was admitted by his attorney acting on his behalf, that they were his nephews. In my view, the denial of a close relationship with Cox and Matthews, who were occupants on the day in question and featured in the search operation of the plaintiff's property, was an attempt by the plaintiff to distance himself from them and any drugs found on his property.

[189] Furthermore, the plaintiff was also unclear as to whom he left in charge of his property and had no explanation as to why there were 6 or 7 people in his property on the day in question. He also denied that there were any drugs found on the property,

yet the arrests of the occupants, the section 212 statement of Ntloko and the testimonies of Grove and Valentyn, contradict his version: drugs in the form of tik, heroin, cannabis and mandrax were found in his property along with cash.

[190] The plaintiff also blindly accepted or believed Williams' version that a flare was fired from outside his house and entered through the small door, and he could not explain why the pleadings and his attorney's letter of demand differed materially in respect of the aspect related to the flare. Furthermore, he was adamant that the fishermen he transported, only carried fish and that he did not see a flare, which was a strange statement to make. He did not elaborate on this and it begs the question how, if he only transported the fishermen, he would know exactly what they carry and/or do not carry.

[191] Ms Stemmet, on the other hand, gave an improbable account that R100 000 worth of fruit and vegetables was packed to the ceiling of a small room, which none of the officers observed or noticed during the search of the premises. She also conceded that one of the occupants used drugs and she chalked this down to children being naughty, yet when regard is had to the ages of the occupants as per their statements, then it is clear that none of them were children at the time.

[192] As with her husband, Ms Stemmet also sought to distance herself from a relationship (albeit a secondary relationship through marriage) with Cox and Matthews. Her version was that Altino Adams was left in charge of the property. Ms Stemmet admitted that there were rooms downstairs and an open plan kitchen but denied the existence of a small storeroom under the staircase.

[193] Overall, while the plaintiff and Ms Stemmet were better witnesses than Williams, their suggested lack of knowledge on certain aspects (what was allowed to occur in their house (drug use) and the storeroom under stairs) and contradictions on others (stock packed in the house, nephews Cox and Matthews, occupants in charge of the property), raise questions as to the reliability of their testimonies.

[194] I also must ask why Valentyn, Grove and Absolon would fabricate a story about a small storeroom wherein a flare was discharged during the search. As with Williams'

version, which made no sense, it also makes no sense that the three Metro Police officers would concoct an elaborate story about a storeroom built into the stairs when, in any event, the pleadings admit that an officer (Absalon) discharged the flare in a room the plaintiff's property.

[195] In my view, the officers might as well then have stated that the flare was discharged in another part of the house, away from Cox and the other officer who was in the vicinity of the kitchen and stairs at the time Absalon unpacked the items.⁷³ It would serve no purpose, particularly as it is admitted in the Plea and in oral testimony that Absolon activated a flare in a dark room, to fabricate a story about a storeroom under the stairs.

[196] The only reasonable inference to draw is that the plaintiff and Ms Stemmet feigned ignorance of the storeroom as it suits their version to distance themselves from the evidence that drugs were found on their property. As for Siebritz, who was an occasional visitor, his view was that the area under the stairs was too small to accommodate a storage space. This testimony was advanced without qualification or explanation as to any detail he relied on.

[197] On the other hand, Valentyn was able to provide dimensions of the storage space, as stated above, and testified that the incline of the staircase resulted in or affected the space in the storage area. The defendant's witnesses also testified that the space was made of knotty pine and had a swivel door, thus very specific detail was provided. In my view, the defendant's version is logical, clear, based on observations and experience during the search and dimensions, while the plaintiff's is a bald denial of the existence of a room under the stairs.

[198] Furthermore, it also makes sense that Cox, who was known to frequent the plaintiff's property, and was a nephew of the plaintiff, would know of a small storeroom. Having regard to the evidence and reliability of the witnesses' versions, I find that the version of the defendant's witnesses, that Cox pointed out a small storeroom which formed part of the staircase, as described, is the more probable version.

⁷³ The reference was to an officer Gilly

[199] In view of the admission in the Plea, as well as the consistent testimonies of Grove and Valentyn, and the content of the Absolon's statement that Cox showed them to a dark room and while searching the area, a flare was discharged, I find that the defendant's version that the flare was stored in the storeroom (in the plaintiff's residence) is the more probable and acceptable version.

[200] While the plaintiff's counsel submits that it is inherently improbable that a member of the public would store a maritime distress flare in an unsecured and unstable condition in a residential dwelling, and in the absence of direct evidence, it is implausible that someone would do so. I need not make a finding on this aspect. It is anyone's guess as to how the flare was obtained, and who stored it in the storeroom and the manner of storage and its exact placement. To embark on such exercise would be to travel down a path of speculation and not fact or evidence. However, as the issue was raised in the plaintiff's submissions, a determination may be made as to whether Absalon brought the flare into the property.

Has the plaintiff discharged the onus of proving that the Metro Police officer was negligent?

[201] I have rejected the plaintiff's version that an unknown officer fired the flare from outside, into the house. This therefore leaves the defendant's version that Absolon activated the flare in the cramped storeroom under the stairs, when he pulled at an item with the result that a fire started and the plaintiff's property burnt.

[202] In cross examination, it was put to the defendant's witnesses that Absolon could have concealed the flare under his jacket and all the more so as no parades and searches were conducted by the officers of their colleagues prior to the search operation. Grove admitted that no searches occurred and was ready to concede that an officer could hide something in his jacket. In my view, such admission does not create a situation of reasonable doubt as contended for by the plaintiff's counsel. The defendant's counsel's submission is correct that this would be the criminal standard, which does not apply in the matter.

[203] Also, Grove's admission is not detrimental to the defendant's defence. To the extent that the plaintiff implies that Absalon could have planted the flare in the storeroom by concealing it under his jacket, I point out that this is as fanciful as the version that the flare was discharged outside the house by an un-named officer. With respect to counsel, my view is that it is far-fetched to suggest that the officer in charge of the search operation (Absalon) would do the following: receive a search warrant, all the while concealing a maritime flare on his person, then proceed to enter the identified premises, conduct investigations and seize drugs while in the house, then wait for an "opportune moment" in a small, less than 2-metre high space packed indiscriminately with items and "*stuff*", then remove the flare from his jacket while his colleagues are positioned close behind him; activate the flare which is (probably) less than arm's length away from him and cause a fire within the confines of the small dark storeroom.

[204] The plaintiff's suggestion, were it to be accepted, would mean that the Court is called on to believe that Absalon potentially intended to set himself, his colleagues and anyone else in the vicinity (Cox) and the plaintiff's property alight, and deliberately so. It also makes no sense that he would deliberately activate the flare and possibly destroy evidence of drugs and firearms that may have been in the storeroom. Furthermore, the suggestion that Absalon was somehow responsible for planting a flare in the storeroom is rejected out of hand. On another point, the defendant's witnesses were also referred to the Metro Police's search for explosives, but this is incorrect. According to the search warrant, the search involved drugs, ammunition, firearms, and illegal alcohol. Having regard to the evidence, I reject the suggestion alluded to that Absalon carried a flare on the day and planted it in the storeroom.

[205] As the plaintiff's version of discharge of the flare is rejected, the question is whether negligence is established on the defendant's version. The test to establish negligence is formulated in **Kruger v Coetzee**⁷⁴ and may be summarised as follows: negligence arises if a reasonable person in the defendant's position (i) would foresee the reasonable possibility that his conduct would injure a person or his property and

⁷⁴ 1966(2) SA 428 (A) 430 E-F; Minister of Safety and Security and Another v Carmichelle 2004 (3) SA 305 (SCA)

cause him patrimonial loss; (ii) would take reasonable steps to guard against such an occurrence; and (iii) (that the defendant) failed to take such steps.

[206] In this matter, the reasonable person would be the reasonable police officer. As far as the first stage of the **Kruger v Coetzee** test, the foreseeability stage, the conduct refers to Absalon's actions in setting off or discharging the flare in the storeroom. Thus, the enquiry is whether a reasonable police officer, searching for drugs, ammunition and firearms in a residence, would have foreseen the real possibility that a fire would ensue when searching the storeroom and pulling at an object, which turned out to be a flare.

[207] In **Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd**⁷⁵, a fire to a cold storage unit was ignited by a distress flare fired randomly by an unknown person. The flare landed on the roof of the building, caused the gutter to burn and the result was extensive damage to the structure. The SCA, in considering the question of culpability in the circumstances of the matter, stated the following:

“[24] *Having regard to the particular circumstances of the case, it seems to me therefore that the question of culpability must be determined not simply by asking the question whether fire, ie any fire, was foreseeable but whether a reasonable person in the position of Worthington-Smith or Visser would have foreseen the danger of fire emanating from an external source on the roof of the building with sufficient intensity to ignite the gutter. This is the question to which I now turn.*”

[208] In consideration of the above authority, I point out that Absalon was engaged in removing items packed in the cramped area, searching for drugs, ammunition and firearms in an area that was pointed out by Cox. He was not searching for explosives, as suggested by the plaintiff. Can it be said that, during he search, he would have foreseen the possibility of a fire caused by a flare? In my view, having regard to **Sea Harvest**, Absalon cannot reasonably be expected to have foreseen that an item he

⁷⁵ 2000(1) SA 827 (SCA)

would try to remove (as with the previous paint tins, crates, a hose pipe, a vacuum cleaner), would be a flare which would discharge and cause a fire.

[209] The evidence is that the area was small, cramped and packed to capacity. Grove and Valentyn's testimonies indicate that there was no order to the items in the space and various items were taken out by Absalon. A flare is a small item in relation to a hose pipe, paint tins, a crate and a vacuum cleaner, so the impression gained is that items were either packed one on top of the other or randomly, with no real order, cohesion or categorisation.

[210] As the evidence indicates that it was packed to capacity, full of stuff as Valentyn indicated, it is conceivable that a flare could or was placed between bulky items or easily camouflaged. In pulling on the item⁷⁶, the reasonable police officer would not have foreseen that he was pulling on a flare; rather, it may have suggested ammunition hidden or placed in some sort of container or canister.

[211] Perhaps if the officers were searching for explosives, the argument of the plaintiff would have been convincing. As it is, what must have been foreseeable (by Absalon) was the danger of a fire emanating from the ignition of a flare sufficient to set the items in the storage room alight⁷⁷. Objectively considered, the reasonable officer would not expect a flare-ignited fire to ensue while executing a search in a residential property.

[212] Having considered the evidence and submissions, I conclude that a flare-induced fire fell outside the reasonable foresight of the reasonable police officer in Absalon's position at the time. If anything, it was an extra-ordinary event encountering a flare during a search operation in a storeroom, which may be described as remote and unlikely.

[213] It is also clear from Absalon's statement that after he pulled at the item, the item "*went off*" and the room lit up, he then or thereafter thought that it might have been a

⁷⁶ It is indicated that a string or cylinder shaped object was stuck and Absalon pulled at it.

⁷⁷ Sea Harvest, *supra* par [24]

flare. This *ex post facto* or hindsight knowledge does not assist the plaintiff because the reasonable police officer is not expected to have the benefit of hindsight but rather, reasonable foresight. Having regard to the above discussion, I find that reasonable foreseeability, the first leg of the ***Kruger v Coetzee*** test, has not been established by the plaintiff.

[214] There were submissions that Absalon could have approached the search in the storeroom differently and had he done so, he would have noticed that the item was a flare. On the evidence, the dimensions of this small space of under 2 metres was not challenged. Secondly, while Valentyn was questioned about the use of his torch, he was consistent and his testimony was logical, that he provided light via his torch. Both Grove and Valentyn explained that Absalon used both hands to pack out items and hand it over backward to his colleagues.

[215] That being the case, and remembering that he was unpacking a vacuum cleaner, crates, tins and a hosepipe, it is realistic to expect that he would use both hands to do so. The impression about the space is that it was dark, there was no room to move but illumination was provided by Valentyn's torch, and the open plan kitchen area further ahead. There were no light switches in the confined space.

[216] I hold the view that with the illumination provided by Valentyn, and using both hands, it was reasonable of Absalon to unpack items and move it backward to his colleagues to place on the floor next to the stairs. The view that he should have unpacked an item and inspected each item separately or something along those lines, would not necessarily mean that the flare would not have ignited when he took hold of the item, and in all probability, given the size of the space, there was no space to place an item down, inspect it and then take another item.

[217] The fact that Grove was not questioned about Valentyn, does not render either of the defendant's witnesses' testimonies less than reliable. Grove had confirmed that there were other officers assisting at the staircase. Both witnesses made concessions when necessary and gave straightforward accounts of the events, without

embellishment. I certainly do not hold the view that they colluded or discussed their testimonies prior to the trial.

[218] In view of the above discussion and findings, I do not hold the view that had Absalon searched the storeroom in a different fashion/manner, it would not have triggered the flare. The risk associated with the flare igniting remained. There are no further details as to how the storeroom was packed and the only person who could have provided that information, is deceased. In the result, I find for all the reasons set out above, that the plaintiff has failed to show that Absalon was negligent as alleged. Thus, for completeness' sake, the version of Absalon as presented in his statement, is accepted.

[219] On the issue of *res ipsa loquitur*⁷⁸, my finding is that the inference of negligence on the part of Absalon because of the ignition of the flare which led to the fire, does not occur. All the crucial facts were not in the defendant's sole knowledge: for example, the defendant's members did not place the flare in the storeroom; the Metro Police were in charge of the search but the occupants were in charge of the property on which the flare and drugs were found; and, how the flare was stored. In conclusion, I find that the plaintiff has not discharged the onus of proving that the Metro Police officers, and thus the defendant, were negligent in the circumstances as pleaded.

Order

[220] In the result, the following order is granted:

The plaintiff's claim is dismissed with costs, including the costs of the postponement on 8 November 2024 (scale C).

M PANGARKER

⁷⁸ See generally, *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA) par [10]; Amler's Pleadings, Tenth Edition, Harms and Townsend, p276

JUDGE OF THE HIGH COURT

Appearances

For Plaintiff: Adv P Tredoux

Instructed by: T Swartz Attorneys
BELLVILLE

For Defendant: Adv M A Greig

Instructed by: Fairbridges Wertheim Becker
CAPE TOWN