Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: A34 / 2022

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

18 June 2024 […]

In the matter between:-

KLEINBOOI MONARENG **Appellant**

and

MAJORIES TRADING ENTERPRISE CC **Respondent**

JUDGMENT

SNYMAN, AJ

Introduction

[1] This judgment concerns an appeal against a judgment handed down by the Regional Court for the Regional Division of Gauteng, held at Pretoria. In terms

of this judgment, handed down by Regional Magistrate J Luus, the appellant's claim against the respondent for damages was dismissed with costs, including the costs of counsel. In a nutshell, the case concerned an incident where one Emanuel Monareng (Monareng)[1], an employee of the respondent, had shot the appellant in the leg. At trial, the respondent raised the defence of necessity, which defence was upheld by the Magistrate, leading to the refusal of the appellant's claim.

[2] The appellant raised several of grounds of appeal. First, the appellant contends that the defence of necessity was never pleaded, nor proven. Secondly, the appellant states that the Magistrate never gave reasons why Monareng had an interest that would be worthy of protection, nor found in what danger he was at the time. Thirdly, the appellant submits that he had committed no wrongful / unlawful act that justified him being shot, whilst it was in fact Monareng that behaved unlawfully by entering the appellant's taxi without permission. Fourthly, the appellant raises a number of issues concerning the conduct of Monareng himself, which according to the appellant was not considered by the Magistrate. These issues are that that Monareng's life was not in danger, he was not suffering immanent harm, and he acted with intent in shooting the appellant. And finally, other individual grounds of appeal include that Monareng had no authority over the appellant and thus the appellant owed him no legal duty, as well as Monareng having alternative and less invasive measures available to him, rather than shooting the appellant, which, according to the appellant, the Magistrate did not consider.

[3] From the outset, it must be said that in this case, there existed two directly and mutually contradictory and irreconcilable versions, to the extent that there are virtually no overlapping facts and only one version can be true. The only core facts that were common cause was that Monareng was employed by the respondent as a security guard, that he was on duty on 5 November 2015 at the premises of the respondent, that the appellant entered the premises

[1] There is no relationship between Monareng and the appellant, whose surname is also Monareng.

driving his taxi, and that some point Monareng shot the appellant in his leg whilst they were both in his taxi.

[4] The Court in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*[2] succinctly set out how such mutually contradictory and irreconcilable versions should be determined and resolved, as follows:

> '... 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 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. ...'

[5] With the above principles in mind, I now turn to deciding this appeal, by first setting out the relevant background facts, as testified to by the appellant and Monareng.

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[2] 2003 (1) SA 11 (SCA) at para 5. See also *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D – G; *Oosthuizen v van Heerden t/a Bush Africa Safaris* 2014 (6) SA 423 (GP) at para 31.

The relevant background

[6] The respondent conducts business at the Waltloo Testing Grounds (the premises), where it employs Monareng as one of its security guards. It was undisputed that the security guards are employed by the respondent to safeguard property at the premises, which would include exercising access and loss control and the searching of vehicles leaving the premises. The security guards are uniformed guards, licenced to carry firearms.

[7] The events giving rise to this matter occurred on 5 November 2015, and it was common cause that on that day, Monareng was on day shift duty. The appellant is a taxi driver, driving a taxi with blue PEP stickers on the taxi. It was common cause that the appellant drove this taxi into the premises on 5 November 2015.

[8] Whilst it was common cause that on 5 November 2015 Monareng ultimately shot the appellant in his leg whilst he was seated in the driver's seat of the taxi, pretty much everything else that happened in between the appellant entering the premises with his taxi and then ultimately being shot by Monareng, was in dispute.

[9] The events of 5 November 2015 however have a preamble. On 4 November 2015, Gladys Selepe (Selepe), who was also a security guard employed by the respondent, was on duty at the premises. She testified that she saw a blue and white taxi with PEP stickers parked next to an Isuzu bakkie on the premises.[3] She added that she saw two persons, one sitting in the taxi with the door open and the other being under the bakkie, busy with its spare wheel. She recorded the registration number of the taxi as being V[…] GP. It was undisputed that this was the registration number of the taxi driven by the appellant. Under cross examination, Selepe did say that she was not able to positively identify the appellant as one of the two persons she saw at the taxi.

[3] The reference to 'Isuzu' was erroneous, as it was undisputed that it was a Toyota Hilux bakkie.

[10] According to Selepe, the two persons must have seen her, as they left in the taxi leaving the spare wheel of the bakkie behind. She then reported the incident by making an entry of the events in the occurrence book (OB). According to her, she in her OB entry also recorded that all security guards had to be alert about this.

[11] The appellant, in presenting his testimony, disputed that he was ever at the premises on 4 November 2015. Despite confirming that that his taxi's registration number was V[…] GP, he could not offer a feasible explanation as to how Selepe could have recorded that registration number in the OB book on 4 November 2015, if he was not there on 4 November 2015.

[12] As touched on above, Monareng was called by the respondent to testify about the events on 5 November 2015. According to him, and when he came on duty, he was briefed about and saw the entry made by Selepe in the OB about the events the previous day. This placed him on alert in respect of the bakkie, which was still parked at the premises. He testified that he was posted at the gate to the premises, and part of his duties was to search vehicles leaving the premises. He explained how the search would ordinarily be conducted. He would place a cone in front of the gate to stop the vehicle. He would then greet the driver, and ask to search the vehicle. He would also ask the driver to switch the vehicle on and off, and then ask the driver to open the trunk of the vehicle so it can be searched.

[13] Monareng testified that he witnessed the taxi with the PEP stickers entering the premises through the gate on 5 November 2015, and saw it park in the proximity of the Toyota Hilux bakkie, but not right next to it. He also saw the driver and another person in the taxi whilst it was being driven into the premises, and identified the appellant as the driver. When the taxi parked, the appellant exited the vehicle, whilst the other person existed the taxi at the back through the sliding door. The appellant stood at the front of the taxi, looking from side to side and at the gate, in a manner that caused Monareng

suspicion. The passenger moved to the bakkie with a tool in his hand used to remove spare wheels, and then removed the spare wheel from the bakkie. He also saw the passenger carrying the spare wheel from the bakkie and putting it into the back of the taxi.

[14] According to Monareng, the appellant and the passenger got back into the taxi, and the taxi started manoeuvring to leave the premises. Monareng walked to the gate and closed it. The gate consists of two steel gates that close against each other. He stated that he closed the gate because of what he had witnessed. He waited at the gate for the taxi to arrive, and the taxi then stopped in front of the gate. Monareng testified that he approached the appellant at the driver's door, greeted him, and requested him to allow his vehicle to be searched. There was no response forthcoming from the appellant. Monareng then moved across the front of the taxi to the sliding door on the other side. At this time, both the appellant and the passenger were seated in the taxi.

[15] Monareng testified that when he sought to open the sliding door of the taxi, the appellant directed the passenger to get out of the vehicle and open the gate, which the passenger did. Monareng proceeded to open the sliding door of the taxi, and got into the taxi, whilst the passenger was still moving towards the gate. As soon as Monareng got into the taxi, and whilst the sliding door was still open and he was standing upright in the back of the taxi, the appellant sped off and crashed through the gate, causing the sliding door and the left-hand mirror to fall off the taxi.

[16] The taxi, driven by the appellant and with Monareng inside just behind the driver's row of seats, sped for about 40 meters to a red traffic light. Monareng described it as driving at '*high speed*'. The taxi jumped the red light and turned left. And all the while, the appellant was braking and accelerating, in a fashion, according to Monareng, that sought to eject him from the speeding taxi. After turning left at the traffic light, the appellant continued to drive in the same erratic fashion.

[17] Monareng testified that he spoke to the appellant to get him to stop. He stated that he feared his life was in danger because he did not know where the appellant was taking him, and he wanted to get out the taxi. He even resorted to telling the appellant that he had an eight months' old baby, hoping that it would instil some mercy in the appellant and convince him to stop. No response was however forthcoming from the appellant, who continued driving at high speed and erratically.

[18] According to Monareng, it is at this point that he took out his firearm for the first time, and showed it to the appellant. He stated that he did this to show the appellant that he was armed, and hopefully that would get the appellant to stop. Instead, the appellant answered him, and stated that he (the appellant) was familiar with firearm regulations, and that Monareng would not be entitled to use the firearm. Suffice it to say, showing the firearm to the appellant still did not convince him to stop the taxi. Instead, and according to Monareng, the appellant sharply pressed the brake so that Monareng, who was still standing in the back of the taxi and would be unstable, would fall towards the appellant. When Monareng then indeed fell forward towards the appellant, the appellant reached back over his head so as to grab Monareng, and according to Monareng, this was done presumably to disarm him. When that was not successful, the appellant then accelerated again, causing Monareng to fall back onto the second row of seats.

[19] Monareng stated that after he righted himself, he fired a warning shot out of the open door of the taxi, once against as a measure to show the appellant that the firearm was functional and hopefully that would get the appellant to stop. But once again, this had no effect.

[20] As far as Monareng was concerned, he then had no choice but to shoot the appellant in his leg to get him to stop, so that he could escape the danger he was in. He testified that: '*What came to my mind was today, either today is my day I meet my maker meaning either I am going to die or something bad was*

going to happen to me'. He shot the appellant in the leg, and this caused the appellant to bring the taxi to a stop. When the taxi stopped, Monareng immediately jumped out of the taxi, and moved some distance away from it.

[21] There was further testimony by Monareng about the appellant getting out of the taxi and moving towards him, whilst accusing him of bring violent, followed by the arrival of SAPS on the scene, but none of this evidence is of importance in deciding this case. It was in the end common cause that SAPS did arrive at some point, statements were taken from all the parties, but no criminal prosecution against any party followed.

[22] As opposed to the aforesaid, the version testified to by the appellant was entirely different. It must first be said that what was put to Monareng by the appellant's counsel under cross examination was entirely different from the appellant's testimony when he gave evidence in chief, which issue will be dealt with later in this judgment. The appellant testified that he went to the premises on 5 November 2015 to check if he had any outstanding traffic fines. He was alone in the vehicle at the time. He stated that he was not sure how long he was there, but he found the queue too long and decided to leave. When he was leaving, he found a person wanting transport into town, and he agreed to take the person to where the person could connect with taxis going into town.

[23] The appellant then drove towards the gate, with this passenger, and when he got to the gate, it was closed, however there was no one to open it. That was when he asked his passenger to get out to open the gate. It is when his passenger got out of the taxi to open the gate that the appellant noticed a person coming from the rear of the taxi and he heard the sound of the sliding door opening. This person was Monareng. According to the appellant, Monareng opened the sliding door with so much force that the door fell off.

[24] The appellant testified that Monareng then jumped into the taxi, whilst brandishing a firearm, and pointed the firearm at him. Monareng then told the

appellant that he (the appellant) had come to the testing ground to steal tyres, and the appellant answered by saying whose tyre did he steal. Monareng responded by saying to the appellant that the day before yesterday '*you had come and then ran away, but today you are not going to run away*'. Monareng next simply shot the appellant in the leg and got out of the taxi.

[25] The appellant however did confirm in his testimony that when Monareng got into the taxi and pointed the firearm at him, he did identify himself as a security guard and said he wanted to search the taxi.

[26] According to the appellant, he never drove the taxi out of the gate. It remained stationary at the gate, and he was shot whilst sitting in the taxi inside the gate. He stated that after being shot, he then remained seated in the taxi in pain, and did nothing further. A white Polo vehicle then stopped at the scene and police officers got out. They asked the appellant what was happening, and he answered he had been shot. The police then also questioned Monareng.

[27] The appellant added that because the taxi was stationary inside the gate, it was causing a blockage because vehicles could not enter and exit. The police in the white Polo instructed him to move the taxi. He testified that it was then that he asked his passenger to open the gate so he could go through.[4] The passenger opened the gate and he drove through and for a distance of about 500 meters away, where he then parked in a spot indicated to him by the police. He was adamant that he never drove the taxi down the road or through any red light, with Monareng inside.

[28] The appellant instituted legal proceedings against the respondent on 22 August 2018. In terms of his particulars of claim, he claimed that he was unlawfully and intentionally assaulted by Monareng on 5 November 2015 with a firearm, by shooting him, whilst Monareng was acting in the course and scope of his employment with the respondent. The appellant contended he

[4] This contradicted his earlier testimony that he asked the passenger to open the gate when he first stopped at the gate.

was injured as a result, and sought general damages in the sum of R400 000.00.

[29] In the respondent's plea filed on 19 November 2018, the respondent did not dispute that Monareng had shot the appellant. It was however disputed that Monareng had wrongfully and unlawfully assaulted the appellant. Of importance in this matter, considering the grounds of appeal raised by the appellant, the respondent pleaded a number of pertinent facts in support if its defence. Firstly, it was contended that the appellant had effectively kidnapped Monareng when he attempted to search the appellant's taxi as part of his ordinary duties. Secondly, it was stated that whilst in the taxi, the appellant drove at an excessive speed so as to eject Monareng from the taxi, thereby placing Monareng's life in danger. Thirdly, and as a result of the physical danger to Monareng, he first fired a warning shot, and then, as a result of continuing physical danger, he shot the appellant in the leg to repel the attack on him. And finally, it was pleaded that Monareng acted in self-defence.

[30] In her judgment given on 2 November 2021, the Magistrate appreciated that she needed to decide between two mutually contradictory and irreconcilable versions. She thus proceeded in deciding the merits of the case by first making credibility findings. She found the testimony of Monareng to be consistent under evidence in chief and cross examination, however found the appellant to be vague in answering questions. Importantly, the Magistrate highlighted what she identified as 'inconsistencies' in the appellant's case. These included: (1) the version put to Monareng under cross examination was not the version the appellant testified to; (2) it was the appellant's testimony that he was shot at the gate, but what was put to Monareng was that the appellant thought he was being hijacked which caused him to speed off in fright; (3) the version of Monareng as what happened to him whilst inside the speeding vehicle was not disputed; and (4) it was put to Monareng under cross examination that he never sought permission to search the vehicle whilst the appellant conceded in evidence that Monareng did ask for permission to do this. The Magistrate concluded: '*The plaintiff clearly adjusted*

his testimony as the trial continued. The Court finds his version highly improbable and rejects his version'. The Magistrate then proceeded to decide the case on the version presented by Monareng.

[31] The Magistrate applied the law to the proven facts. She decided the case based on what she termed a '*state of necessity*'. She considered that the state of necessity was not caused by Monareng, but by the appellant. She held that he was performing his duties as a security guard and had asked permission to search the vehicle. She further held that Monareng did not '*force*' the appellant to smash through closed gates and then drive off with Monareng inside the vehicle. The Magistrate analysed the law relating to the principle of necessity, and came to the conclusion that the requirements thereof had been satisfied. She thus concluded that the actions of Monareng were lawful, and dismissed the appellant's claim with costs. Hence the current appeal.

Analysis

[32] The appropriate point of departure is perhaps to consider the appellant's ground of appeal that the defence of necessity was never pleaded by the respondent. In this context, it is true that in the respondent's plea, it is stated that Monareng acted in self-defence in order to repel an attack on him. What is however also true is that where it comes to the facts as pleaded by the respondent to substantiate that the conduct of Monareng was lawful, the respondent specifically relied on the continuing physical danger to Monareng caused by the events that transpired, and his need to '*repel*' that danger. The question now is whether the manner which its case was pleaded by the respondent, means that the Magistrate was confined to deciding this case only on the basis of self-defence, to the exclusion of necessity. For the reasons to follow, I think not.

[33] It is trite that a litigant is bound by the case as pleaded.[5] But this is not an immutable principle. In *Minister of Safety and Security v Slabbert*[6] the Court held:

> 'The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.
>
> There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd, this court said:
> "However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue."'[7]

[34] The aforesaid principle is particularly apposite *in casu*, because of the fairly close relationship between the concepts of self-defence and necessity. The one is readily susceptible to being confused with the other. The subtle difference between the two lies in the fact that self-defence requires an unlawful attack to be perpetrated, whist necessity does not. This could

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[5] See *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others* (2015) 36 ILJ 363 (CC) at para 68; *Knox D'Arcy AG and Another v Land and Agricultural Development Bank of South Africa* [2013] 3 ALL SA 404 (SCA) at para 35; *First National Bank of Southern Africa Ltd v Barclays Bank PLC and Another* 2003 (4) SA 337 (SCA) at para 6; *Absa Bank Limited v IW Blumberg and Wilkinson* 1997 (3) SA 669 (SCA) at 681G-H*; Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd* 1992 (2) SA 807 (A) at 816D-F.

[6] [2010] 2 All SA 474 (SCA) at paras 11 – 12. See also the minority judgment as approved of by the majority at para 22, where it was said: '… *A court is not bound by pleadings if a particular issue was fully canvassed during the trial. …*'. See further *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636C-D, where the Court held: *'… in the absence of an averment in the pleadings or the petition, a point may arise which is fully canvassed in the evidence, but then it must be fully canvassed by both sides in the sense that the Court is expected to pronounce upon it as an issue. …*'.

[7] The Court was referring to *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) at 714G-H.

feasibly trip up a pleader. In *S v Adams*[8] the Court described it succinctly as thus:

> '... While the rules governing necessity and self-defence bear many similarities and the two defences are sometimes confused, they are distinguishable in law. In this regard, see the article by J M Paley 1971 *Acta Juridica* 205 at 229 and compare *S* v *Moller* 1971 (4) SA 327 (T). Self-defence involves the conduct of a person defending himself against an unlawful assault or the imminent threat of one. Necessity involves an escape from a situation of emergency or the imminent threat thereof. ...'

[35] *In casu*, and despite the defence being relied on by the respondent in the plea being labelled as one of self-defence to an attack, the pleaded facts are more akin to Monareng seeking to escape from an emergency, namely his life being in danger. It is not pleaded that the appellant was attacking Monareng unlawfully. It was specifically pleaded that the appellant speeding off in a vehicle Monareng was about to search, with him inside, and driving in such a fashion at an excessive speed so as to eject him from the vehicle, put his life in danger. It can certainly be said that the pleaded facts contemplate a defence of necessity, rather than self-defence.

[36] But even if it is accepted that the respondent pleaded a case of self-defence and not a case of necessity, I do not believe in this particular instance, it prevented the Magistrate from deciding the case based on necessity. This is because a case of necessity was fully canvassed between the parties in evidence. In fact, and in the evidence ventilated by both parties, there was no suggestion of an attack by the appellant on Monareng. It was always about Monareng considering that his life was in danger as a result of being trapped in an erratically driven vehicle, caused solely by the unlawful conduct of the appellant, taking him to some unknown destination. The cross examination of Monareng focused on what would be necessity considerations. I am satisfied that the Magistrate properly identified the true issue in dispute, and that is the defence of necessity. The Magistrate cannot be faulted for deciding the case

[8] 1979 (4) SA 793 (T) at 796C-F.

on that basis. In my view, for the appellant to now complain that the Magistrate should not have decided the case based on necessity is opportunistic. As held in *Cadac (Pty) Ltd v Weber-Stephen Products Co and Others*[9]: '*... Litigation is not a game*.'

[37] It may also be added that whether an established set of facts in turn establish self-defence, or necessity, is in essence a question of law. As such, it would be competent for the Magistrate to consider it. In *Molusi and Others v Voges NO and Others*[10] the Court held that:

> 'Of course there are instances where the court may of its own accord (mero motu) raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed ...'

In casu, there can be little doubt that the question of law (necessity) fully emerged from the evidence and that it was extensively canvassed in the testimony (including cross-examination) of both the principal witnesses. It can hardly be legitimately said that the appellant was in any way prejudiced because the Magistrate decided the matter on such basis, even if it was not pertinently pleaded.

[38] Two comparable examples bear mention. In *McGrane v Cape Royale The Residence (Pty) Ltd*[11], the appellant in that case sought to rely on waiver, but failed to pertinently plead waiver. Despite finding that ordinarily, the failure to plead a case of waiver meant that it could not be relied upon, the Court nonetheless had the following to say:

> 'It is not necessarily fatal to the appellant's case that waiver was not expressly pleaded. In *Collen v Rietfontein Engineering Works* this Court decided the matter on the basis of a contract that was never pleaded and contained different terms to the one that was pleaded. It held that because of the fact

[9] 2011 (3) SA 570 (SCA) at para 10.
[10] 2016 (3) SA 370 (CC) at para 28.
[11] 2021 JDR 2378 (SCA) at paras 22 – 23.

> that all the relevant material had been produced and placed before it, it would have been 'idle for it not to determine the real issue which emerged during the course of the trial'. Similarly, where a party sought to rely on a tacit contract that was not pleaded, Schreiner JA stated that 'where there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the Court is entitled to and generally should treat the issue as if it had been expressly and timeously raised.
>
> More recently this Court held that litigation is not a game. In my view, the issues in the present case were defined, ventilated and examined by way of viva voce evidence before the high court. The appellant, from the onset, and during the trial proceedings, established waiver. He emphatically indicated that he had paid the deposit and the full price in cash and that the respondent's representative knew that he did not require a loan even before the conclusion of the agreement.'

[39] Next, and in *Payi v Minister of Police and another*[12], the Court was seized with a damages claim for unlawful detention. The plaintiff in that case sought to rely, when presenting his evidence, on the poor condition of the cell in which he was detained, but had never pleaded this. Relying on *Unicorn Shipping Lines supra,* the Court concluded:[13]

> 'After the plaintiff testified about the condition of the cells in which he was kept, the defence cross-examined him about it. *Adv Dala* put it to him that the defendants would deny whatever he said regarding the condition of the cells. In any event, the plaintiff testified about his experience in custody, which cannot be divorced from the fact that he was in custody. That he was arrested and detained is uncontroverted, as alluded to earlier. Moreover, the defendants will not be prejudiced as both parties fully canvassed it. …'

[40] I therefore conclude that the issue of necessity was properly considered by the Magistrate, and she was entitled to decide the case on that basis. This ground of appeal accordingly has no substance, and falls to be rejected.

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[12] 2024 JDR 0775 (ECP).
[13] Id at para 38.

[41] This brings me to the next primary ground of appeal raised by the appellant, being whether necessity was in fact proven. This would be entirely dependent, in this matter, on what version is to prevail. As said, the Magistrate effectively rejected the entire version of the appellant. Was she however justified in doing so?

[42] From the outset, it must be said that appeal courts are loath to interfere with credibility findings of the court *a quo.* In this instance the Magistrate, presiding over the trial, had the benefit of observing the witnesses, their demeanour and the manner in which they presented their evidence in real time. The only basis where interference would be justified is where the evidence, as it appears from the appeal record, shows that the credibility findings of the Magistrate was entirely out of kilter or irreconcilable with such evidence, and / or the evidence was wrongly considered.[14] The principle was enunciated in *Bernert v Absa Bank Ltd*[15] as follows:

> 'What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys, which the appellate court does not. These advantages flow from observing and hearing witnesses, as opposed to reading 'the cold printed word'. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to 'tie the hands of appellate courts'. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts, and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.'

[14] *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) at para 5.
[15] 2011 (3) SA 92 (CC) at para 106.

[43] In this instance there is no justification for interfering with the credibility findings, or the manner in which the Magistrate evaluated and applied the evidence. From the outset, and as a general proposition, the evidence of the appellant was entirely unsatisfactory, even based on just a reading of the transcript of the trial. It was clear that he had difficulty in answering basic questions, and answers were often suggested to him by his counsel. His independent recollection of events was lacking, with a complete absence of chronological flow where it came to his testimony. He contradicted himself in several instances, and also contradicted an earlier statement he had made to SAPS. I believe that the Magistrate was quite correct in saying that he appeared to be making up his case as he went along. It was plainly apparent that he was neither a credible nor reliable witness. In *Hal obo Mml v MEC for Health, Free State*[16] the Court had the following to say:

> '... Credibility has to do with a witness's veracity. Reliability, on the other hand, concerns the accuracy of the witness's testimony. Accuracy relates to the witness's ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence. ...'

[44] As opposed to the appellant, Monareng fared well. He presented his testimony in a concise manner, entirely based on his own recollections. There were no contradictions in his testimony. Under cross examination, he stuck to his version, and no contradictions emerged. He was also willing to make concessions where required, such as that possibly other alternatives could have been open to him instead of shooting the appellant, however he then offered a cogent and rational explanation why this was not viable in the circumstances he found himself in. Overall considered, he was an open and honest witness, and his recollection of events was reliable, a fact the Magistrate properly and correctly recognized.

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[16] 2022 (3) SA 571 (SCA) at para 66.

[45] But issues of credibility and reliability aside, there is another important reason why any version the appellant chose of offer had to be discarded. This reason relates to the fact that there was a material contradiction between what was put to Monareng under cross examination as to what the appellant's version (testimony) would be and what the appellant ultimately testified when he came to give evidence. And added to that, several important aspects of Monareng's evidence were never even challenged, as well as several aspects of the appellant's own testimony not even being put to Monareng, under cross examination. The implications of these kind of failures were identified in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[17] as follows:

> 'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.

The Court added the following:[18]

> 'The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence

[17] 2000 (1) SA 1 (CC) at para 61. See also *Galawe v Montsi* 2024 JDR 1369 (FB) at para 22.
[18] Id at para 63.

> given by the witness or others and to explain contradictions on which reliance is to be placed.'

[46] In ABS*A Brokers (Pty) Ltd v Moshoana NO and Others*[19], the Court said:

> 'It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness (see *Van Tonder v Killian NO & ander* 1992 (1) SA 67 (T) at 72I). He has not only a right to cross-examination but, indeed, also a responsibility to cross-examine a witness if it is intended to argue later that the evidence of the witness should be rejected. The witness' attention must first be drawn to a particular point on the basis of which it is intended to suggest that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation (see *Zwart & Mansell v Snobberie (Cape) (Pty) Ltd* 1984 (1) PH F19 (A)). A failure to cross-examine may, in general, imply an acceptance of the witness's testimony. In this regard Pretorius has the following to say in *Cross-examination in SA Law* (Butterworths 1997) at 149-50:
> '. . . [I]t is unjust and unfair not to challenge a witness's account if offered the opportunity, then later argue - when it is no longer possible for the witness to defend himself or offer an explanation - that his evidence should not be accepted. ...'

[47] What was specifically put to Monareng by the appellant's counsel as constituting the case the appellant would come and testify to was, in sum, the following: (1) On 5 November 2015 when leaving the premises, the appellant found the gate was closed and he did not see Monareng either at the gate or at the driver's door of the taxi; (2) the appellant asked his passenger to open the gate because it was closed and there was no one at the gate; (3) the first occasion the appellant saw Monareng was when Monareng opened the sliding door of the taxi violently; (4) Monareng did not greet the appellant or ask for permission to search the taxi; (5) the appellant saw Monareng had a firearm in his hand and thought he was being hi-jacked; (6) because he thought he was being hi-jacked, the appellant sped away from the scene; (7)

[19] (2005) 26 *ILJ* 1652 (LAC) at para 39

the reason why Monareng shot the appellant was to bring the taxi to a standstill; and (7) when the taxi came to a standstill after Monareng shot the appellant, he remained seated in the taxi until the paramedics came and they removed him from the taxi. Monareng disagreed with these propositions put to him, and reiterated his testimony as set out earlier in this judgment.

[48] The principal difficulty however is that virtually everything put to Monareng under cross examination, as set out above, was never testified to by the appellant when he came to give evidence. I have set out what he in fact testified to, earlier in this judgment. But in a nutshell, he testified that he never sped away believing he was being hi-jacked, and in fact he did not exit the premises through the gate at all. Obviously, and based on this version, he led no testimony on how the taxi was being driven to contradict what Monareng had said. He also testified that Monareng got into vehicle, did introduce himself as being security wanting to search the vehicle, and in effect accused the appellant of stealing and to prevent him from escaping promptly shot the appellant in the leg before exiting the taxi. It is patently apparent that there is no correlation at all between this testimony and what was put to Monareng. The upshot of this is that the appellant's entire version, as testified to when giving evidence in chief, was never put to Monareng under cross examination.

[49] Added to the above, there was also extensive cross examination of Monareng concerning the events that took place whilst he was in the taxi being driven by the appellant. In the course of this cross examination, it was never disputed the appellant was indeed driving off in the taxi with Monareng still inside. It was never disputed that Monareng first showed his firearm to the appellant, and fired a warning shot out the door, before ultimately shooting the appellant in the leg. The fact that the mirror of the taxi came off when the appellant crashed through the gate was never disputed.

[50] Monareng was further cross examined about his belief that his life was in danger because of the manner in which the appellant drove the taxi. In this context, a number of propositions was put to him. it was suggested to him that

he could have strapped himself into one of the seats. It was further suggested that he faced no real danger inside the taxi, and that the fact that he did not know where the taxi was going could not cause him to believe there was danger. It was put to him that he could have used his telephone to call for help, or he could even have jumped out the open door of the taxi. Monareng disagreed and explained why he believed his life was in danger, and why he considered he had no other alternative. Significantly, and when the appellant testified, he led no testimony whatsoever to back up these propositions, and to explain why these propositions as alternative means to avoid the danger other than shooting him in the leg, would be viable. In fact, and considering his version in evidence that he did not drive away at all, he could not present such testimony.

[51] Some further aspects of the appellant's testimony never put to Monareng under cross examination was: (1) that the appellant entered the premises without a passenger and that he only picked up the passenger when leaving; (2) the appellant's entire version that SAPS arrived at the premises where the taxi was still parked inside the closed gate; and (3) that SAPS asked the appellant to move the taxi that was blocking the gate to an area about 500 meters away. It is not lost on me that all of this testimony is in any event a material contradiction of what was actually put to Monareng, namely that the taxi was being driven and came to a standstill after the appellant was shot in the leg, and the appellant remained seated in the taxi until he was taken away by paramedics.

[52] In sum, and considering all the anomalies as set out above, it must follow that the version of Monareng had to be accepted, and the entire version to the contrary, as put forward by the appellant, had to be rejected. Truth be told, the version of the appellant had all the hallmarks of an entirely fabricated case. This matter fell to be decided on the basis that the Magistrate could place absolute reliance of the version of Monareng, to the exclusion of anything the

appellant had to offer, which she did. As said in *National Employers Mutual General Insurance Association v Gany*[20]:

> 'Where there are two stories mutually destructive, before the *onus* is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the *onus* rests is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the Court of first instance that the version of the litigant upon whom the *onus* rests is the true version, and that in this case absolute reliance can be placed upon the story as told by A. ...'

[53] Once the version presented by Monareng prevails, and absolute reliance can be placed on it, a simple and clear picture emerges. The appellant and his passenger came to the premises on 5 November 2015 to remove the spare wheel from the Toyota Hilux, after having been interrupted in this activity the previous day (4 November 2015) by Selepe. The events of the previous day had been reported in the OB, and this put Monareng, who was duty at the gate, on alert. Monareng witnessed the taxi driven by the appellant, with a passenger, stopping in the vicinity of the Toyota Hilux, and the appellant and the passenger then getting out, with the appellant keeping a lookout whilst the passenger removed the spare wheel. The spare wheel was then placed in the taxi. In properly and lawfully discharging his duties as security guard, Monareng closed the gate to stop the taxi from leaving so he could formally search the taxi, as required and expected of him.

[54] When the taxi stopped at the gate, Monareng went to the driver's door where the appellant was, greeted the appellant, and asked to search the taxi. Monareng was uniformed, as a security guard, when making this introduction. The appellant did not answer. Monareng then rounded the front of the taxi to open the sliding door on the left to search the taxi. The moment Monareng sought to open the sliding door, the appellant told his passenger to get out the vehicle and open the gate. Monareng however opened the sliding door and got in. Obviously knowing the tyre was inside the taxi, the appellant then sped

[20] 1931 AD 187 at 199.

off and crashed through the gate, causing the side mirror and sliding door to come off. This left Monareng, who at that point had stepped into the taxi, to be trapped in the speeding taxi with a missing sliding door.

[55] What happened next all took place within a few minutes. The appellant was driving the taxi erratically and at high speed, and through a red traffic light. He was attempting to cause Monareng to fall out of the vehicle. Monareng pleaded with the appellant to stop, even citing personal circumstances. The appellant ignored this plea. It is only then that Monareng, who was at that point fearful for his life because of the manner in which the taxi was driven and that he had no idea where the appellant would be taking him, took out his firearm, and showed it to the appellant to get him to stop. Not only did this not have the desired effect, but the appellant attempted to disarm Monareng. Monareng fired a warning shot out the door, but this also did not cause the appellant to stop. Only then did Monareng shoot the appellant in the leg, which caused the taxi to stop, and Monareng jumped out immediately.

[56] In the context of all of the above facts, was necessity established? In *Maimela and Another v Makhado Municipality and Another*[21] the Court held as follows:

> '... It suffices to say that necessity, unlike self-defence, does not require the defendant's action to have been directed at the perpetrator of an unlawful attack. It is invoked where the action, or conduct, of the defendant was 'directed against an innocent person for the purpose of protecting an interest of the actor or a third party (including the innocent person) against a dangerous situation'. And whether or not the defendant's conduct would be covered by the defence of necessity will depend on all the circumstances of the case.
>
> Professor Jonathan Burchell suggests that for an act to be justified on the ground of necessity the following requirements must be satisfied:
> '*(a)* A legal interest of the defendant must have been endangered, *(b)* by a threat which had commenced or was imminent but which was *(c)* not caused

[21] 2011 (6) SA 533 (SCA) at paras 16 – 17. See also *Petersen v The Minister of Safety and Security* 2009 JDR 0826 (SCA) at para 11.

> by the defendant's fault, and, in addition, it must have been *(d)* necessary for the defendant to avert the danger, and *(e)* the means used for this purpose must have been reasonable in the circumstances. ...'

[57] The Court in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*[22] dealt with the concept of necessity as follows:

> 'But our law also recognises that there are circumstances in which even positive conduct that causes bodily harm will not attract liability. That is so where the harm is caused in circumstances of necessity, which have been described as occurring when the conduct is 'directed against an innocent person for the purpose of protecting an interest of the actor or a third party (including the innocent person) against a dangerous situation'. It is well established that whether particular conduct falls within that category is to be determined objectively. That the actor believed that he was justified in acting as he did is not sufficient. The question in each case is whether the conduct that caused the harm was a reasonable response to the situation that presented itself ...'

The Court concluded that:[23]

> 'Essentially, what is called for is a weighing against one another of the gravity of the risk that was created by the defendant, and the utility of his conduct. As it is expressed by Boberg:
> 'Proportionality, in the sense of a preponderance of avoided over inflicted harm, is a traditional postulate of necessity. . . .'
> In short, the greater the harm that was threatened, and the fewer the options available to prevent it, the greater the risk that a reasonable person would be justified in taking, and *vice versa …'*

[58] As to whether the conduct of a defendant relying on necessity would be considered to have been reasonable in the circumstances, the Court in

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[22] 2007 (2) SA 118 (SCA) at para 10.
[23] Id at para 14.

Maimela and Popela v Makhado Municipality[24] added the following considerations:

> '… the fact that the attacker or threatened attacker for example the plaintiff, is the one who initially acted unlawfully tips the scales in favour of the defendant and so the interest protected does not have to be exactly commensurate with the interested infringed, however there must not be an extreme imbalance between the two interests.
>
> The test for determining whether all the above comments are present is objective in the sense that it is not what the defendant believed the situation to be, but whether a court awaiting an armchair evaluation and placing itself in the circumstances faced by the defendant considers the retaliation of the defendant to be present upon. ...'

[59] The summation of the legal position where it comes to necessity cannot be complete with reference to the following *dictum* in *Herschel v Mrupe*[25]:

> 'No doubt there are many cases where once harm is foreseen it must be obvious to the reasonable man that he ought to take appropriate avoiding action. But the circumstances may be such that a reasonable man would foresee the possibility of harm but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of taking precautions, which may be a factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening. If the harm would probably be serious if it happened the reasonable man would guard against it unless the chances of its happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial the reasonable man might not guard against it even if the chances of its happening were fair or substantial.'

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[24] 2010 JDR 0014 (GNP) at para 8.
[25] 1954 (3) SA 464 (A) at 477A-C.

[60] Returning to the case *in casu*, the point of departure must be the fact that it all started because the appellant entered the premises to commit misconduct, by misappropriating the tyre of the Toyota Hilux, and this conduct was witnessed by Monareng. So, what happened next was not a search of a vehicle as an ordinary day to day occurrence. It was a case of Monareng having to exercise his duty as a security guard to effect loss control at the premises. It does not take much insight to appreciate that this may attract an adverse reaction by a perpetrator like the appellant. Why this is important, in the context of what happened, is that it can reasonably be said that Monareng would be justified in fearing what the appellant would do to him, as he caught the appellant in the act, so to speak.

[61] The conduct of the appellant, virtually immediately when Monareng stepped into the taxi to legitimately search it as part of his duties, of speeding away and crashing through a closed gate, undoubtedly endangered a legal interest of Monareng. The danger was compounded by the fact that Monareng, whilst still standing in the back of the taxi with an open (non-existent) sliding door, was effectively thrown around because of deliberate erratic driving by the appellant aimed at ejecting him from the taxi, which was travelling at speed. Monareng clearly explained why he believed his life was in danger, and considering what was happening, it makes common sense. If he was thrown out of the speeding taxi he could be killed or injured, or the taxi could crash with him inside it considering how it was driven, or if he ended up at some unknown destination, who knows what the appellant, who had already behaved in an unlawful manner, could do to him. None of this can be said to be the fault of Monareng, as he was, as said, carrying out his ordinary duties as security guard and there was no legitimate cause or reason for the appellant to act as he did. In fact, and in my view, that is why it was put to Monareng that the appellant believed he was being hijacked when he sped away, which contention turned out to be false. It follows that the first part of the defence of necessity has been established by the respondent.

[62] The next question then is whether it was necessary for Monareng to have shot the appellant in the leg to avert the danger, and whether this means used can be seen to be reasonable in the circumstances. In this regard, it must be considered that all of the events took place in the space of a few minutes. There is very little time for Monareng to take a breather and consider his options, a fact he made clear in his evidence.[26] It also takes place in the confines of a speeding taxi with a gaping hole where the door was. All Monareng wanted was to avert the danger by getting out of the taxi. He had no intention of arresting the appellant or acting against him in any manner. He did not produce his firearm as a measure of first instance. He rather first pleaded with the appellant to stop so he could get out. He then merely showed the firearm to the appellant to get him to stop. He next fired a warning shot out the door. When all of this could not get the appellant to stop, he shot him in the leg, which caused the taxi to stop. That allowed Monareng to immediately jump out the taxi, which finally averted the danger to him. It must also be considered that Monareng discharged the firearm responsibly, causing minor physical injury to the appellant. If all of this cannot be said to be reasonable and necessary, it is difficult to understand what would be. As held in *Minister of Safety and Security v Mohofe*[27], also in a case involving necessity:

> 'Nemengaya discharged that duty by doing what he had been trained to do. There is nothing to suggest that he behaved in a manner different from the way in which the hypothetical reasonable police officer would behave in the circumstances. If the reasonable police officer would foresee the possibility that an innocent bystander might be injured or killed by an armed suspect, what steps would he take to avert this while nevertheless doing his duty? In determining whether the second test in *Kruger v Coetzee* has been met, one must weigh the 'gravity of the risk' (a bystander being shot) with the 'utility of his conduct ...

[26] In *South African Railways v Symington* 1935 AD 37 at 45, the Court said: '*… One man may react very quickly to what he sees and takes in, whilst another man may be slower. We must consider what an ordinary reasonable man would have done. Culpa is not to be imputed to a man merely because another person would have realised more promptly and acted more quickly. Where men have to make up their minds how to act in a second or a fraction of a second, one may think this course the better whilst another might prefer that. …*'.
[27] 2007 (4) SA 215 (SCA) at para 12.

> To this should be added the rider that the reasonable person might not guard against the risk if the alternatives posed just as much risk. …'

[63] For the sake of being complete, I will consider the so-called alternative measures Monareng could have adopted, as suggested to him by the appellant's counsel. It was suggested he could have called for assistance on his cell phone. How that could have mitigated the immediate danger he was facing is unclear, as surely it would take time for someone to come to his assistance, which could be too late. It was further suggested that he strap into a seat. But this would leave his fate in the hands of a perpetrator who, at that point in time, was doing his best to eject Monareng from the taxi. And finally, it was suggested Monareng jump out the open door of the speeding taxi. This suggestion is simply preposterous, as it could cause Monareng injuries and even death. It is never a good idea to jump out of a speeding vehicle. Realistically, the purported available alternatives were no alternatives at all.

[64] Finally, it must be considered that it was the appellant's own unlawful conduct that caused what happened to come to pass. As such, and even if there may be some doubt, it would tip the scales in favour of Monareng.

[65] In the end, I am satisfied that Monareng was placed in a dangerous situation as a result of the unlawful conduct of the appellant. The danger to Monareng was exacerbated by the fact that he was visited with this danger in the course of him carrying out his lawful duties as security guard, and not due to any fault of his own. The danger to him remained extant whilst he was trapped in a speeding and erratically driven taxi with the appellant as driver, that refused to stop. All Monareng wanted to do to avert the danger was to have the taxi stop so he could get out. Considering all that he did beforehand, to ultimately shoot the appellant in the leg was a reasonable means to achieve this. Necessity has been established.

[66] The Magistrate was therefore correct in upholding the respondent's defence of necessity. There is no basis, whether in fact or in law, to interfere with the judgment of the Magistrate in the Court *a quo*. It is therefore upheld on appeal.

[67] This only leaves the issue of costs. The appellant was unsuccessful, and thus the respondent should be entitled to its costs. The respondent has prayed for attorney and client costs, but I can see no reason for such a punitive costs order. In my view, an ordinary costs order as contemplated by scale B would be justified in this case.

[68] In all the circumstances as set out above, the following order is made:

Order

1. The appellant's appeal is dismissed.

2. The appellant is ordered to pay the respondent's costs on party and party scale B.

[…]

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SNYMAN AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

I agree.

[…]

Judge of the High Court of South Africa

Gauteng Division, Pretoria

Appearances:

Heard on:	30 May 2024
For the Appellant:	Adv C Zietsman
Instructed by:	Loubser Van Wyk Inc
For the Respondent:	Adv T J Jooste
Instructed by:	Albert Hibbert Attorneys
Date of Judgment:	18 June 2024