THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case : 314/11
Reportable

In the matter between

CITY OF JOHANNESBURG METROPOLITAN COUNCIL **Appellant**

and

PATRICK NGOBENI **Respondent**

Neutral citation: ***City of Johannesburg Metropolitan Council v Ngobeni*** **(314/11) [2012] ZASCA 55 (30 March 2012)**

Coram: Navsa, Heher, Mhlantla, Tshiqi and Wallis JJA

Heard: 28 February 2012

Delivered: 30 March 2012

Summary: Wrongful shooting – conduct of trial judge – irregular – approach to be followed and principles to be applied when dealing with two mutually destructive versions – trial court misdirected itself.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Spilg J sitting as court of first instance).

1 The appeal is upheld with costs including those attendant on the employment of two counsel.

2 The order of the court below is set aside in its entirety and substituted as follows:

'The plaintiff's claim is dismissed with costs.'

JUDGMENT

MHLANTLA JA (NAVSA, HEHER, TSHIQI and WALLIS JJA concurring):

[1] This appeal is directed against a judgment of Spilg J sitting in the South Gauteng High Court, Johannesburg, in terms of which the learned judge upheld the claims for wrongful shooting, arrest and detention by the respondent, Mr Patrick Ngobeni against the appellant, the City of Johannesburg Metropolitan Council. It is convenient to refer to the parties as they were cited in the court below.

The background

[2] On 15 September 2004, the plaintiff was shot by a metro police officer Thabo Ledwaba during an incident which occurred at the intersection of Queen Street and Buckingham Avenue, Kensington, Johannesburg. Following the shooting, the plaintiff was admitted to

hospital having sustained two bullet wounds. He was arrested and detained whilst in hospital. As a result of the incident the plaintiff was rendered a paraplegic. He subsequently instituted an action against the defendant and its two employees. The metro police officers who were involved in the incident, were Mr Ledwaba, who died before the commencement of the trial and Mr Mandlakayise Mabaso. The plaintiff claimed damages from the defendant and the two police officers arising from the shooting incident and for his subsequent arrest and detention.

[3] The plaintiff founded his claim on two alternative grounds. First, he claimed that Mabaso and/or Ledwaba unlawfully assaulted him by inter alia:

(a) pointing a firearm at him;

(b) shooting him multiple times and wounding him; and

(c) jumping on his chest.

In the alternative, he claimed that Ledwaba negligently discharged the firearm in his vicinity and this led to him being injured in his left shoulder and hip.

[4] The defendant and its employees pleaded that on the night in question Mabaso and Ledwaba, in their capacity as metro police officers, had stopped the plaintiff for a traffic offence and enquired whether he was in possession of a valid driver's licence. At a certain stage, and whilst they were executing their duties as such, the plaintiff suddenly and without reason, extracted an unlicensed firearm from his vehicle and pointed it at Mabaso. The plaintiff further assaulted Mabaso by hitting him with the firearm on his right eye. As a result of the plaintiff's actions, Ledwaba who had been inspecting a licensed firearm found in the plaintiff's

possession, sought to defend Mabaso and in the course of such defence fired three shots at the plaintiff with the licensed firearm.

[5] During the course of the trial in the court below, it became apparent that the plaintiff was pursuing his claim solely on the basis that Ledwaba had acted negligently when he fired the rounds which caused his injuries. On the other hand, the defendant adduced evidence in support of its defence of justification. At the end of the trial, the judge was faced with two mutually destructive versions. He accepted the plaintiff's version and held that the defendant and its employees were liable for the damages suffered by the plaintiff. The defendant now appeals against that judgment with the leave of this court.

The evidence

[6] Before identifying the issues on appeal I will proceed to set out a brief exposition of the evidence adduced in the court below. The plaintiff testified in support of his case. Inspector Raletsemo testified on behalf of the plaintiff upon the insistence of the trial judge. Six witnesses were called on behalf of the defendant. Mabaso was the defendant's main witness. The trial judge *mero motu* ordered an inspection in loco to be held and thereafter called Mr Maseko, the owner of the vehicle driven by the plaintiff during the incident.

[7] The plaintiff testified that on 14 September 2004 at 22h30, whilst driving a Nissan LDV (Nissan) to Fontana Cafe, he had failed to stop at a stop sign at the intersection of Queen Street and Buckingham Avenue, Kensington. Two metro police officers noticed the infraction, stopped his vehicle and parked their own vehicle immediately behind the Nissan. Ledwaba exited the patrol vehicle and approached the plaintiff, who by

then had also alighted from the Nissan. They met towards the rear of the Nissan where Ledwaba requested the plaintiff to produce his driver's licence. The plaintiff disclosed that he did not have a licence, whereupon, so he said, Ledwaba asked the plaintiff to 'make a plan'. The plaintiff handed Ledwaba R40 which the latter accepted but had protested that it was not enough.

[8] According to the plaintiff, Ledwaba approached the front of the Nissan and noticed a loaded and cocked semi-automatic Norinco pistol lying on the front seat of the vehicle. He took the weapon. The plaintiff produced the Norinco's licence upon Ledwaba's request. Ledwaba proceeded to check the licence using the lights of the patrol vehicle. It was at that stage that Mabaso alighted from the patrol vehicle and approached the plaintiff who was standing outside the vehicle but within the area of the open door of the Nissan. He had his back to the seat and his left hand was resting on the open door.

[9] When Ledwaba finished checking the firearm licence, he proceeded to the front of the Nissan. Using the torch in his left hand and holding the Norinco in his right, he checked the licence disc. It was at that stage that the plaintiff heard three shots being fired in quick succession. According to him, once the trigger is depressed and held, the Norinco would fire all the rounds in the weapon. The plaintiff believed that the shots had been fired accidentally because immediately after hearing the shots, he heard Ledwaba saying 'eish' as an exclamation of surprise. The plaintiff could not feel anything from the waist down and fell to the ground whilst holding onto Mabaso. He subsequently discovered that he had been struck by two of the three rounds. He explained that he was left to lie there for approximately four hours before

he was removed to hospital. Whilst lying there Mabaso jumped on his chest. He did not lose consciousness and was aware of his surroundings until his admission to the hospital where he was kept under police guard.

[10] The plaintiff confirmed that he had made two written statements to the police. The first, to Inspector Nathane, who has since died, was made in August 2005, whilst the second was taken by Inspector Molatelo Raletsemo in October 2007. He also made a report to Dr Güldenpfennig, who had been instructed by his attorney to compile a medico-legal report. There were material contradictions between these statements and his evidence. In certain instances the plaintiff denied some parts of the statements stating that he had not conveyed to the police the information contained therein. This was despite the fact that a similar report had been given to Dr Güldenpfennig.

[11] The trial judge insisted that Inspector Molatelo Raletsemo be called as a witness during the plaintiff's case. He testified that he took over the investigation of the case after the previous investigating officer Nathane had died. Raletsemo testified that during October 2007, he consulted with the plaintiff and recorded a second statement. He explained that the plaintiff was offered an opportunity to make use of an interpreter but declined. He communicated with the plaintiff in English, isiZulu and Sepedi. According to him, the plaintiff appeared to be panicking and uncomfortable when he made the second statement. After recording the statement, the plaintiff read and signed the statement after confirming the contents. That concluded the evidence adduced on behalf of the plaintiff.

[12] As stated earlier, Mabaso was the main witness on behalf of the defendant. He testified that on 14 September 2004, he and Ledwaba

reported for duty and commenced their shift at 23h00. He was adamant that the incident had occurred on 15 September 2004 at 01h15 and not at the time alleged by the plaintiff. He and his colleague had observed the plaintiff failing to heed the stop sign. They turned on their blue light, stopped the Nissan and parked the patrol vehicle behind the plaintiff's. As soon as the patrol vehicle came to a halt, a passenger stood up on the back of the Nissan. They became suspicious and both alighted from the patrol vehicle. They met the plaintiff and his passenger towards the rear of the Nissan. The plaintiff was asked for his driver's licence which he could not produce. Ledwaba approached the front of the Nissan and found a cocked Norinco pistol lying on the front seat. He asked the plaintiff for a licence, which was produced. Ledwaba returned to the patrol vehicle in order to verify the licence, using the lights of the patrol vehicle.

[13] Mabaso, at that stage, was searching the passenger who had identified himself as John. After searching the passenger, Mabaso approached the plaintiff in order to conduct a body search. The plaintiff unexpectedly moved away from Mabaso towards the driver's seat of the Nissan. He reached into the vehicle and produced a firearm, which was later identified as a Star PD pistol. The plaintiff cocked this pistol and pulled Mabaso towards him. It was at this stage that the plaintiff hit Mabaso in the right eye with the muzzle of the Star PD uttering the words 'woza la wena nja' (come here you dog). It was immediately after this attack that Mabaso heard three shots being fired in quick succession. Mabaso fell to the ground believing that it was the plaintiff who had fired the shots. He later discovered that it was Ledwaba who had fired the Norinco.

[14] Whilst Mabaso was on the ground, he heard footsteps and realised that it was the passenger who was running away. He gave chase but stopped when the passenger ran into a nearby erf. Mabaso returned to the scene where Ledwaba explained that *he* had shot the plaintiff. He further explained that he had a clear view of the plaintiff when he was holding the firearm to Mabaso's face and that he shot the plaintiff in defence of Mabaso. Immediately after the incident he and Ledwaba reported the incident, calling for backup and an ambulance. Mabaso testified that the ambulance arrived at the scene shortly after they had called for assistance. Other police officers arrived, secured the scene and took photographs.
I must mention that the evidence of Mabaso was interrupted on numerous occasions, namely, when the court on its own initiative ordered an inspection in loco to be conducted and when Inspector Lurie and Mr Maseko were called by the court. I shall deal with this aspect later in my judgment.

[15] Leon Pelser, who is employed by Johannesburg Metro Police Department as an armourer, testified that, on the morning in question, he arrived at the scene at 01h55. He confirmed that Ledwaba and Mabaso were on an all night shift from 23h00 to 07h00. Pelser found three spent cartridges at the scene. He took photographs of the scene, made notes in his investigation diary and requested Mabaso and Ledwaba to provide him with their statements. He explained that Ledwaba reported that the incident occurred at 01h15 and that he had fired three rounds. The officers informed him that the plaintiff had already been taken to the hospital; that immediately before the shooting incident the suspect had been sitting in the door of the vehicle when he suddenly pulled out an unlicensed firearm, cocked it and shoved it into the head and eye of Mabaso. Ledwaba and Mabaso subsequently reported to his office. The

officers each wrote their statements independently, using separate desks and thereafter handed these to him. He read the statements to each officer, and thereafter Ledwaba and Mabaso signed their statements.

[16] During cross-examination, the material parts of Mabaso's evidence were put to Pelser. He testified that if a firearm were cocked, the cartridge would be in the chamber. The round would remain in the chamber when the magazine is removed. To eject it, one has to cock the weapon. He explained that he had not discussed the case with members of the South African Police Services (SAPS) at the scene nor had he examined the firearms. He merely performed his functions without any hindrance or interruption from SAPS members. Answering questions posed by the trial court, Pelser testified that there had been no bullet in the chamber of the Star PD. According to him if the firearm were cocked, the pin or hammer would be lying backwards. In this case, it was not lying backwards but was flat.

[17] Captain Sajad Singh, an official police photographer, testified that he arrived at 02h50 whereafter Sgt Chuene showed him the crime scene. He observed only three spent cartridges. He took photographs and collected forensic evidence. He later compiled a photo album in which various exhibits were identified and drew up a sketch plan. He confiscated the Star PD and the 9mm Norinco firearms.

[18] Inspector Benjamin Lurie, a ballistics expert testified, in circumstances to which I will revert, that he had received a firearm, a .45 ACB calibre Star the serial number of which had been erased (the Star PD firearm), one magazine, and five .45 ACB calibre cartridges. He testified that upon examination and testing of the Star PD firearm, he had

found that it functioned normally. Regarding the serial number, he applied an electro-acid etching process and determined that the serial number of the Star PD was possibly 16067. This serial number however belonged to a different make and model of firearm. He was thus unable to identify the origin or owner of the Star PD. After concluding the examination, he handed the Star PD to the administration section. Lurie explained that should the muzzle of a cocked Star PD pistol be pressed against an object or body part with sufficient force, the slide and the barrel of the pistol would move back and the trigger be disconnected. It is a safety mechanism that is built into the firearm to prevent it from firing. This results in the Star PD pistol not being capable of firing a round.

[19] Regarding the Norinco firearm, Lurie testified that it was not fully automatic. It was necessary for the trigger to be depressed before any round could be fired. Depressing and keeping the trigger depressed would not result in more than one round being fired. His testimony in this regard was contrary to the plaintiff's. Lurie explained that when the trigger is pulled and a shot is fired after extraction has taken place – the cartridge cases are ejected to the right hand side of the firearm. According to Lurie one can accidentally dislodge the safety catch without much difficulty because the safety mechanism on the locking ball of the safety selector does not function fully. The safety selector can fall forward and backwards unassisted.

[20] Michael Venter, who is employed by Nicholas Yale CC, a local agent of the manufacturing company of the Star PD firearm testified but his evidence is of no real consequence.

[21] Mr Mandla Maseko, the owner of the Nissan driven by the plaintiff, attended the inspection in loco upon the request of the trial judge and he brought his vehicle. The judge thereafter called him as a witness. Mabaso's evidence was interrupted by the judge to accommodate this witness. Maseko testified that he and the plaintiff's brother had swapped cars for the day as he had to travel to Piet Retief. On 15 September 2004 he received a call from the police, who enquired about the whereabouts of his vehicle and thereafter notified him about the incident. He later recovered his vehicle from the police in a damaged condition. The driver’s door panel had been pierced by two bullets. The window, as well as its mechanism that allows one to open and close the window, was also damaged. The vehicle was repaired; the bullet holes were closed; the window was replaced and the winding mechanism was fixed.

[22] Dr Gordon Maritz Güldenpfennig was called by the defendant inter alia, to explain the version of events conveyed to him by the plaintiff. He testified that the trajectory of the bullet was downwards. He explained that it was possible that the bullet had ricocheted and come into contact with the shoulder bone which could have caused the bullet to deflect and change its trajectory. According to him the plaintiff has partial sensory loss from the level of T8 further down; thus the paralysis. There was a possible deduction from the way the bullet travelled, as it could have caught the edge of the scapula. The path of the bullet was consistently in a downward direction and it moved to the right side. He testified that, during consultation, there was no mention of the officers trying to get the blood out, nor did the plaintiff mention that the officers tried to kill him. He conceded that the plaintiff may have mentioned this, but because it was not relevant for purposes of the report he did not write it in his notes.

[23] Inspector Rajendra Naidoo's evidence was tendered to disprove the plaintiff's explanation that he voluntarily handed in his Norinco firearm to the police for safekeeping, because he was not permitted to keep a firearm at the place where he was residing. Naidoo's testimony revealed that on 9 September 2005, almost a year after the shooting incident, Naidoo had arrested the plaintiff and confiscated his firearm after receiving a report that the latter had been involved in the theft of a motor vehicle.

The judgment in the High Court

[24] As indicated earlier in my judgment, Spilg J was faced with two mutually destructive versions. Regarding the question of *onus* of proof, the judge held that the issue of the *onus* was irrelevant as, either way, the result would be the same. He preferred and accepted the evidence of the plaintiff. He criticised Mabaso in regard to the time of the incident despite the existence of objective facts which favoured the defendant's version of events. Both Mabaso and the plaintiff testified that they had heard three shots being fired. The judge, however concluded that four or five shots were fired. The judge ignored the evidence of Inspector Lurie that the Norinco was not fully automatic, as well as that of Dr Güldenpfennig in respect of the trajectory of the bullet. Spilg J criticized the manner in which the police had conducted their investigation. In this regard he was strongly influenced by the fact that the plaintiff had never been charged with unlawful possession of a firearm. He suggested that the metro police and Pelser may have conspired against the plaintiff and may have planted the Star PD firearm at the scene to falsely implicate him.

[25] In the result, Spilg J concluded that Ledwaba had not fired the Norinco in order to defend Mabaso, but did so *unintentionally* and negligently.(My emphasis.) He further found that Ledwaba was negligent in that he held a dangerous weapon after having been warned of the existence of a bullet in the breech whilst he was in close proximity to a civilian and still holding the firearm with his finger on the trigger. Spilg J accordingly found that the defendant was liable for the damages suffered by the plaintiff and for the wrongful arrest and detention of the plaintiff. It is against this conclusion that the defendant launched the appeal.

[26] The defendant raised the following issues for determination on appeal:

(a) whether the trial judge had adopted the proper approach when faced with mutually destructive versions;

(b) whether there was any merit in the appellant's perception that the trial judge was biased;

(c) whether the calling of a witness by a trial judge in civil proceedings was irregular; and

(d) whether the calling by the trial judge for an inspection in loco was irregular.

[27] In his written argument counsel for the defendant contended that the judge descended into the arena and committed various irregularities during the trial, namely, the judge *mero motu* called witnesses, called for an inspection in loco to be held and unduly interfered when Mabaso testified. He argued that the conduct of the judge evidenced bias in favour of the plaintiff. On the other hand, counsel for the plaintiff denied the allegation of bias against the judge. He contended that the judge had the

discretion to call witnesses and call for an inspection in loco at any stage of the trial. He submitted that this had not prejudiced the defence case.

[28] In this court the parties agreed that the judge behaved in an inappropriate manner during the trial. They accepted that the judge deserved some censure with regard to the manner in which he conducted the trial. It was submitted that, despite the behaviour of the judge, the appeal could be determined on the merits. It is apposite at this stage to deal with the aspect relating to the judge's conduct, as some of the issues raised may have a bearing on the merits.

The conduct of the trial judge

[29] It is unfortunately necessary to make some adverse comments about the conduct of Spilg J. The trial record runs to approximately 23 000 lines, of which 7200 lines were occupied by the judge, either when questioning witnesses or making comments. His active participation in the proceedings constitutes a third of the record. This, in my view, is highly inappropriate. In a trial the judge has to act as an impartial arbiter. The law requires that a judicial officer must conduct the trial open-mindedly, impartially and fairly and such conduct must be manifest to all those who are concerned in the trial and its outcome.[1] In *Take and Save Trading CC v Standard Bank SA Ltd*[2] Harms JA held:

'A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray.'

[30] In *Jones v National Coal Board*,[3] Denning LJ said:

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[1] *S v Roberts* 1999 (4) SA 915 (SCA) at 923 A.
[2] *Take and Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 at para 4.
[3] *Jones v National Coal Board* [1957] 2 All ER 155 (CA) at 159A-B. See also *Yuill v Yuill* [1945] 1 All ER 183 at 189.

'In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth,[4] and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon, L.C., who said in a notable passage that "truth is best discovered by powerful statements on both sides of the question" . . . and Lord Greene, M.R., who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses,

"he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict."

. . .

So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties . . . So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appears to favour one side or the other . . . And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost . . . The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.'

The procedure described by Denning LJ is clearly set out in rule 39 of the Uniform Rules of Court and governs trials in this country.

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[4]As to the scope of this see Hon J J Spigelman AC *"Truth and Law'* [2011] 85 *ALJR*, 746.

[31] Trollip AJA in *S v Rall*[5] laid down three principles of proper judicial behaviour, namely:

'(1) The Judge must ensure that "justice is done" . . . and should also ensure that justice is seen to be done…. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused.

(2) A Judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants.

(3) A Judge should also refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or unduly influence the quality or nature of his replies and thus affect his demeanour or impair his credibility.'

[32] In *S v Le Grange*,[6] Ponnan JA stated the following with regard to judicial behaviour:

'It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer.'

[33] In this case Spilg J appears to have been on a personal fact-finding mission. He descended into the arena, *mero motu* called witnesses and on his own initiative decided that an inspection in loco be held. I turn now to illustrate the instances where Spilg J entered the fray, contrary to the

[5] *S v Rall* 1982 (1) SA 828 (A) at 831H-832G.
[6] *S v Le Grange* 2009 (1) SACR 125 para 21.

principles outlined above. It will be necessary in certain instances to set out the relevant extracts from the record.

(a) *An order that an inspection in loco be held*

[34] It is trite that an inspection in loco is ordinarily conducted upon the application of a party. If it is at the instance of the judge, he or she must explain why they deem it necessary that an inspection in loco should be held. In all cases it should be held at the earliest possible opportunity. After an inspection, the judge must place his or her observations on the record and allow the parties to comment thereon. The proper method of recording the observations of the court at an inspection in loco was set out in *Kruger v Ludick*[7] as follows:

'It is important, when an inspection *in loco* is made, that the record should disclose the nature of the observations of the Court. That may be done by means of a statement framed by the Court and intimated to the parties who should be given an opportunity of agreeing with it or challenging it and, if they wish, of leading evidence to correct it. Another method, which is sometimes convenient, is for the Court to obtain the necessary statement from a witness, who is called, or recalled after the inspection has been made. In such a case, the parties should be allowed to examine the witness in the usual way.'

[35] The record discloses the following exchange with regard to what transpired before the judge decided that an inspection in loco be held:

'COURT: It is okay. While we are waiting then what is the view about an inspection *in loco*, to see the scene, the view of the plaintiff Mr Swanepoel?

MR SWANEPOEL: M'Lord, I have no objection to such inspection ... [intervention].

COURT: Will it serve a purpose?

MR SWANEPOEL: It will serve a purpose with regard to a certain ... [indistinct] pertaining ... [intervention].

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[7] *Kruger v Ludick* 1947 (3) SA 23 (A) at 31. See also *Bayer South Africa (Pty) Ltd v Viljoen* 1990 (2) SA 647 (A) at 659H-660B and *Goldstuck v Mappin & Webb Ltd* 1927 TPD 723 at 734.

COURT: When should it be conducted though? Because if it is relevant to what you may want to ask this witness, I believe you should not complete your cross-examination, because then it means recalling and it also means that there will be a re-examination.

MR SWANEPOEL: Yes.

COURT: That is the issue. What is your attitude, Ms Goedhart?

MS GOEDHART: M'Lord, my respectful submission to Your Lordship is that we do not believe that it is going to make, elucidate anything. There are photographs in EXHIBIT A which were taken on the night in question, which we submit to Your Lordship would be far more beneficial, because in order to get the same feeling, then you literally have to go there at night time to know how it looked like ... [intervention].

COURT: Have you been to the scene?

MS GOEDHART: No, M'Lord, but the photographs do indicate, M'Lord, that it is a built up area. The other difficulty, M'Lord, is the incident happened five years ago.

COURT: Yes.

MS GOEDHART: There is no guarantee that, if we take the time and spend the time, that when we get there, M'Lord, it will still be the same scene, and, whatever, evidence may or may not have been on the tar at that stage, M'Lord, is now no longer going to be there.

. . .

COURT: So we have got that evidence already. We know it is three houses. That is, I think we are going to have the inspection.'

Upon resumption of the proceedings, and after having conducted the inspection in loco, the judge who appeared to have taken some photographs himself during the inspection in loco, made the following statement:

'COURT: Well I have got news for everybody I downloaded the photographs that were taken yesterday. They are available. Unfortunately I am going to take it no one has got a laptop with them, but there are a number of photographs depicting the door. But possibly the witness can recall and just for assisting us I take it that this is alright.'

[36] There is no doubt that none of the parties applied for an inspection in loco. It is clear that it was ordered by Spilg J to counter the evidence of Mabaso. His evidence was interrupted to allow for the inspection to be held. This was despite the protestations of the defendant's counsel. The judge actively participated during the inspection, took photographs and *mero motu* interviewed Maseko, the owner of the Nissan. After the inspection, the guidelines set out in *Kruger v Ludick* were not followed, in that, the observations of the judge were never placed on record. Instead, the observations by the plaintiff's counsel during the inspection were used as a basis to further cross-examine Mabaso. This procedure was totally flawed. It is unbecoming of a judicial officer to behave in that manner.

(b) *Calling of a witness*

[37] As indicated earlier in my judgment, Spilg J *mero motu* called the investigating officer to deal with the apparent contradictions relating to the statement by the plaintiff. After the inspection in loco he called Maseko to testify. As a general rule, in civil cases, the court has no power to call a witness without the consent of the parties. The issue must be thoroughly canvassed with the parties to enable them to express their views or objections. In *Rowe* v *Assistant Magistrate, Pretoria*,[8] the court held:

‘In a civil action the parties lay before the court what evidence they think is necessary to support their respective cases, and if, on determining the case, a magistrate or judge is unable on the evidence before him to come to a decision, or finds it difficult to decide where the truth lies, I do not think he ought to take upon himself the right of calling a witness who had not been called by either of the parties in order to make his task easier, or in his view, to do justice between the parties.’

[8] *Rowe v Assistant Magistrate, Pretoria* 1925 TPD 361 at 369.

[38] The following statement was made by the trial judge when he decided to call Maseko and in the process interrupted the evidence of Mabaso for the defendant:

'COURT: That he will be called tomorrow, that because he would be predominantly a witness for the plaintiff that despite where we have gone, your rights are rights of examination and the examination whilst Ms Goedhart's rights are those of cross-examination. And that *I am not going to debate on*. If you want I will give you the authority which I have.

. . .

When the cross-examination commenced the judge sought to limit it:

COURT: Court called this witness to deal with the identification of his car.

MS GOEDHART: m'Lord, with respect once a witness is called and the defendant has the opportunity and right, particularly, M'Lord, with respect at the stage at which it has taken place, it was at the court's insistence ... [intervenes].

COURT: Yes.

MS GOEDHART: But we are already in the defendant's case, M'Lord, and the fact of the matter is that there has been no explanation from the plaintiff as to why this particular witness was not called before.

COURT: I must add I do not see the relevance, but I will allow the cross-examination to go beyond the reason for the court calling him, the witness. I will then reconsider the basis upon which re-examination takes place at a later stage, but at this stage your rights of cross-examination are to deal with any matter that you believe relevant, *which will include most probably why you did not call the witness* to deal with where the bullets were in the vehicle on the night. So please carry on.'

. . .

No such restriction was placed on the plaintiff's counsel.

'COURT: That we do have. So I think just confirm that that did take place when he was asked to indicate where he was immediately before.

MR SWANEPOEL: Sir you remember yesterday at the inspection *in loco* you were asked where were you positioned immediately before the incident and you showed the position basically in the door of the driver's side of the bakkie. ... Indeed.' (My emphasis.)

[39] In my view, the manner in which the witness, Maseko, was called is inappropriate. The judge did not explain the purpose of calling this witness. He interrupted the cross-examination of Mabaso. This involved a procedural disadvantage for the defendant. The judge was quick to protect the witness when cross-examined as to his credibility and that of the plaintiff. The trial judge erred when he rejected the objections of the defendant's counsel to his calling Maseko. In my view, the calling of this witness was an irregularity. His evidence is accordingly inadmissible.

(c) *Refusal of the court to excuse a witness*

[40] During the plaintiff's case, an admission was made on his behalf that the contents of Inspector Lurie's report would be admitted. It was therefore no longer necessary to call this witness as the parties were agreed on the contents of his report. Spilg J, however disagreed and refused to excuse the witness as emerges from the following excerpt:

'MS GOEDHART: M'Lord, in light of the admissions Inspector Lurie is present I would like to excuse him in the light of the admissions.

COURT: No, I would actually like to ask him some questions he is not excused. I am serious.

MS GOEDHART: Would Your Lordship ... [intervenes]

COURT: There are things that I would like to know, yes. So when the defendant, he can be on the end of a phone call. I do not know when the plaintiff's evidence ... [intervenes].

MS GOEDHART: As the court pleases.

COURT: But he is not going to be excused there are things that I need to understand as well.

MS GOEDHART: As the court pleases, M'Lord.

COURT: Ultimately, everyone is giving evidence for my benefit.

MS GOEDHART: As the court pleases.

COURT: And I have gone through the papers and there are things and really, I see it as a difficult case and I really would like assistance and from experts. I am not sure Mr Lurie is the one who would know and that is why I cannot say yes or no, but I think when the defendants starts its case if Mr Lurie could be present and then I could release him. Say at 10:00 in the morning I am sure he has important things to do and then we can just release him.'

[41] The parties agreed the contents of Insp Lurie's report. It was not open to the judge to insist that he be called to give evidence on matters extraneous to the report. The manner in which Spilg J dealt with the issue is irregular as he had no regard to the submissions by the parties.

(d) *Interference and interventions by the judge*

[42] The record is replete with instances where the judge intervened by engaging the witnesses, especially Mabaso and Pelser, in unfairly lengthy questioning, a task that ought to have been left to counsel. It is necessary to set out a few of these passages in the judgment to illustrate the point:

(i) Mabaso, during his cross-examination, mentioned that he had previously worked as a paramedic. The judge, not counsel for the plaintiff, promptly challenged him stating that this was new evidence. The following exchange between the judge and the witness ensued:

'COURT: You have not mentioned that in your evidence-in-chief. You hold yourself out as having been able and capable and that is the impression you tried to lead, certainly the court, to believe that you were competent in dealing with this situation. Are you now saying you were not? --- I am trained, M'Lord, the only thing is I am not licensed. The licensing should ... [intervention].

You were never asked about a license, were you Mr Mabaso? --- M'Lord?

Were you asked about a license, yes or no? --- Not at all.

Then answer the question as directed to you, please? --- Alright.'

(ii) As indicated earlier Mabaso's testimony, in particular, during cross-examination, was often interrupted by the judge. The record discloses the following questions put to Mabaso by the judge and his answers to them:

'COURT: Is there anything else that you would like to mention, before Mr Swanepoel carries on that you believe is of relevance? --- I believe it is of, thank you, M'Lord, I think it is of relevance to know the fact that, I was not, I have never had any incident like this in my life, especially that my life should be threatened the way it was. I was not in the right state to do anything and I remember very well Officer Ledwaba asked me to stay away and not have anything to do with him, because it was like he was fearing that maybe I would do anything to injure Mr Ngobeni.

And why was your foot on Mr Ngobeni? --- Yes this happened later on.

Why was your foot on Mr Ngobeni? --- Mr Ngobeni as I was asking him the questions he told me that he is fainting, and so that he says that he is fainting that came to me to say that I would need to turn him on the side. So all I could have done was to hold him with the hands for him to be on the side and maybe put something to make his body tilt.

Why did you not use your hands? --- I could have done that.

Why did you not is the question? --- I would not have a good balance. I could not actually kneel ... [intervention].

But why was Ledwaba not with you? --- He was with me, but he was checking, M'Lord, to say if we have a good cover.

So you are lifting another human being with your foot, that is your evidence? --- I just need to demonstrate what ... [intervention].

Did you or did you not lift another human being with your foot? --- That is what I did, M'Lord.

And that person you know was injured, correct? --- On the side where he was injured ... [intervention].

Was he injured or not? --- He was injured, M'Lord.

Please carry on Mr Swanepoel.'

(iii) A further example of the lengthy questioning by the judge is as follows:

'COURT: So how could you do it with your foot, the right foot you said? --- The right foot, I used the right foot, because my left foot was injured, so I could not really kneel down.

So you stood on your left foot that was injured? --- Yes, M'Lord, but because I held on the door I had balance enough so that I can tilt him on the side.

Sorry, so you stood on your injured foot? ---

The injured foot we are talking of just an abrasion.

No, but you did not say that it was just an abrasion? --- I did say that, M'Lord.

In your statement, you said there was an injury, not an abrasion in your statement. Let us go to your statement --- On the statement it does not say but in the court I did.

What did you call it? --- I called it that I was injured.

You were injured? --- I was injured yes.

Any injury? --- Yes.

And in your evidence-in-chief you said it was an abrasion? --- I did say an abrasion, M'Lord.

Okay. --- So I did clarify.'

(iv) The judge continued with his questions and became more aggressive in his approach. Counsel for the plaintiff had to observe whilst the judge proceeded with the lengthy questioning. The record reads:

'COURT: Sorry, who found the firearm? --- Mr Ledwaba.

So please how do you explain this? Mr Mabaso I am now saying it is not a game here. We cannot, one cannot keep changing situations. Now you told us, you testified that Mr Ledwaba had taken the firearm from the vehicle. How could he possibly then be covering while you said at the same time as it sounded to me that you were searching the passenger. Now please, how can you perform, how can Mr Ledwaba now be assuming a position if both of you are searching? Please Mr Mabaso do not assume *that this court is a toy to be played with.* Will you please tell me which version it is, because unless you can reconcile the two? Can you reconcile the two? --- I can.

Now do so? --- At the time when I went into the vehicle approaching the bakkie, their vehicle, Mr Ledwaba was ahead of me. He is the one who approached them and I also approached them and at the time as we both approached them, I took the position of having to search the passenger, because he went past the passenger and also went past the driver, Mr Ngobeni. So him going to take that position, he just spotted that a

firearm is just lying on the seat. So he asked the question about the firearm, so him having to see the firearm and asking the firearm, he thought he should just take it immediately.

. . .

COURT: Did anything else occur, that you have not told the court at this stage? Anything else? --- M'Lord, it happened very fast. I am quite sure that all I remembered it was more the conversation, ... [indistinct] to the court, what he asked it was about the drivers license that was Officer Ledwaba, he asked about ... [intervention].

What I find very strange Mr Mabaso. --- Yes, M'Lord?

And maybe you can assist. Is that you start off by claiming that there is a suspicion, because the passenger is lying on the back? --- That is correct.

Because you do not expect to see anyone at the back? --- Not really, M'Lord, can I explain?

No, no I understand that. And you know that the greatest version is that there was nobody in the vehicle? --- That is correct.

So now something that you do not expect which is denied, but let us just stay with it, you were suspicious, because somebody is in the back? --- That is correct.

Mr Ledwaba sees a firearm lying and nothing is said, no further action is taken and no other proportioning matters, measures are taken and you are happily being satisfied that the passenger is okay. His hands can go down. Mr Mabaso I have great difficulty in understanding this. --- I do understand, M'Lord, but I can just ... [indistinct].

Yes please, because I need assistance, if that is how it happened, that is how it happened. --- M'Lord, there are a number of things that have been said which I do not think I will be in a position I can say that, even if it was said it was not true. Example the manner of us using the torch, I did not have a torch, and Officer Ledwaba did not have a torch. So in a manner ... [intervention].

Did you have a torch in the vehicle? --- The torch was there in the vehicle.

So there is a vehicle that is issued with a torch? --- That is correct.

But you did not use it? --- We did not use the torch.

Alright. --- So, it actually makes sense to say that, at the way of the passengers especially approaching us, we should not really allow that to happen. Now the suspicion ... [intervention].

Why did you not say stop? --- Even in not doing that I do not understand.

When you got out of the vehicle, why did you not say stop to them? --- M'Lord, when we put on the blue lights, it is common that obviously you are going to stop. So the driver immediately alighted from the vehicle. We are not comfortable with that, because if then if you happen to elect the passenger, I mean the driver, a suspect having to come to you then you are not in the better position to defend yourself, anything can happen.

So you got three, actually three causes of concern there? --- That the concern yes, for the suspect to approach me.

Okay. --- That is a concern. The other concern is having to have a passenger at the back of the bakkie lying down, unless one is sick, so the question was asked to Mr Ngobeni to say why is the passenger lying at the back and he said he does not know him, he does not trust him, so that is why he is sitting on the back. So that to me really still put up a concern. That is the reason why I would ask you got to lift up your hands. That is what we immediately asked them that they should lift up their hands. But we used that discretion. We could also have followed by having to point them with a firearm until the search was over, but we did not do that.

MR SWANEPOEL: I put to your ... [intervention].

COURT: Sorry I have a question, why not? --- We felt that they were complying, because they lifted their hands up.

Thank you. --- So ... [intervention].'

(v) What follows herein is a further examination of Mabaso by the judge. In certain instances, there is an indication that the judge was not satisfied with the responses and would ask repetitive questions:

'COURT: Why is that, why do you not agree? --- Because at the time when the shooting took place it was Officer Ledwaba who shot. It was three quick shots ... [indistinct].

Are you definite about it? You are certain, you do no mistake that there might have been four? --- This was three ... [intervenes].

Are you definite that there was not four? --- M'Lord, ... [intervenes].

Even though you were in whatever state you say you were? ---

M'Lord, it was three quick shots.

You are certain? --- Certain about it, M'Lord.

If someone said there were four would they be lying? --- I know that it was only three.

Would they be lying if they said there were four? --- They would, M'Lord.

Thank you. Please continue.'

'COURT: Sorry an incident of this nature, what do you mean by that?

MR SWANEPOEL: A serious incident.

COURT: Oh, sorry, I missed that. Sorry, a serious incident of this nature, you say, you put to the witness a serious incident of this nature.

... [intervenes].

MR SWANEPOEL: I can re-ask the question, M'Lord.

COURT: No, no, I just need to know what the answer was. I mean the question and the answer.

MR SWANEPOEL: A supervisor ... [intervenes].

COURT: Yes?

MR SWANEPOEL: I put the words a senior officer from Metro Police must attend the scene.

COURT: Okay. A senior officer of Metro Police must attend the scene of an incident of this nature.

MR SWANEPOEL: Indeed, M'Lord.

COURT: Of a serious incident of this nature.

MR SWANEPOEL: Do you agree? --- I do agree.'

[43] It is possible but not necessary to set out all the passages in which the trial judge interfered. The record speaks for itself. As a general principle, the judge may ask questions at the end of re-examination to clarify issues. In *S v Mafu*,[9] the court held that although a presiding

[9] *S v Mafu* 2008 (2) SACR 653 (W).

judicial officer is sometimes obliged to ask questions of witnesses, it is important to guard against conduct which could create the impression that the judge is descending into the arena of conflict or is partisan or has already decided issues which should only be decided at the end of the trial. Nor should a presiding officer put attacking propositions to an accused person, as such conduct is capable of creating the impression that the judge is acting as a cross-examiner, associating himself with the case for the state. The court also emphasised the manner of questioning because an irregularity will occur when questions are put to an accused in a belligerent or intimidating manner, or so repetitively or confusingly, as to amount to judicial harassment.

[44] As is apparent from the examples cited above, the judge improperly interfered and took a very active role in the trial. He also interrupted the cross-examination of Pelser and questioned him extensively. I do not intend to set out the relevant extracts. The questions in most instances were not meant to clarify issues but to show inconsistencies in the witnesses' evidence and discredit them, a task that should have been reserved for counsel. This is evidenced by the judge's remarks with regard to the decision of the National Prosecuting Authority, an aspect that will be addressed shortly in my judgment. In the result, the actions of Spilg J had the effect of creating a perception that he was the plaintiff's second counsel.

(e) *Concerns of the trial judge about the decision of the National Prosecuting Authority*

[45] Spilg J was alarmed to learn that the office of the National Prosecuting Authority (NPA), was ready to make a decision on whether or not to continue with the charges against Mabaso. He felt strongly that such a decision by the NPA, albeit an independent institution, could not be made prior to the delivery of his judgment. What follows herein are his views in effect expressing that the NPA should wait for his judgment before taking a decision.

'COURT: There is an issue that is of great concern to me in particular with regard to the administration of justice. I am most concerned that on Monday a decision may be made by the prosecuting authority as to whether to continue with the charges against Mr Mabaso or not. I obviously have not formed a view on, but of concern to me certainly is the lack of adequate investigation that to me was quite apparent from the current investigating officer's answers. I do not know if anyone is going to be attending court, the Criminal Court on Monday. Mr Swanepoel are you aware if the attorney is going?

MR SWANEPOEL: We are not a part of those proceedings, M'Lord.

COURT: Well I am concerned that if a decision is taken and that decision is not to continue with the prosecution that it is premature for that decision to be taken until my judgment is delivered.

MR SWANEPOEL: I agree, M'Lord.

COURT: But the matter is to proceed, I have no difficulty with that, but if a decision is taken and I need to know who the prosecutor is and that I need to be in contact with that prosecutor so that there is no misunderstanding. But I believe an informed decision with regard to the continuation of prosecution or not may depend on the decision I make and as a High Court I would regard it as disrespectful if a decision is taken now with full knowledge that a judgment is awaited in this very matter concerning the same issues as the *onus* would be different, but that the same issues and that it is a *prima facie* decision is going to be taken, sorry, a decision is going to be taken by a prosecuting authority based on information that he is given, which I believe will be inadequate until such time as my decision comes out and I am

planning to give this decision certainly I was hoping within a day or so of hearing argument. It looks like argument may only be during court recess, but I would appreciate it if I can be given the number of the prosecuting authority and that counsel are in my presence when I speak to the prosecuting authority.'

[46] Section 179 of the Constitution deals with the NPA.[10] Its independence is guaranteed therein. The judge is not entitled to discuss the prospects of the case with the prosecutor or request him or her to make a decision to prosecute. There is no doubt that Spilg J wanted to speak to the prosecuting authority. In my view, the quality of his views on the issues appear to have been impaired. He seems to have made up his mind that Mabaso was guilty of an offence; hence his desire that the NPA should await the delivery of his judgment. In my view, what the judge sought to achieve can be seen as an attempt to intrude upon the prosecutorial independence of the prosecuting authority in contravention of the Constitution and the National Prosecuting Authority Act 32 of 1998.

General remarks by Spilg J

[47] Spilg J made various comments during the trial. He referred to his army training and involvement with the former South African Defence Force and South African Police Services and his involvement with insurance companies etc. I do not intend to burden this judgment with all the comments which, in my view, were unwarranted.

[48] In the result, Spilg J breached many of the canons of judicial behaviour and was overzealous in his approach. Conduct of this nature cannot be countenanced and has the potential of bringing the judiciary

[10]Section 179(2) of the Constitution provides:
'The prosecuting authority has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary function incidental to instituting criminal proceedings.'

into disrepute. His behaviour constitutes an irregularity which would have vitiated the proceedings but for the parties' request that we consider the merits on appeal.

[49] It is to that issue that I now turn. The judgment of the court below was assailed on the grounds that the judge had failed to apply recognised principles when dealing with two mutually destructive versions and that he had, as a result, failed to consider the inherent improbabilities in the plaintiff's evidence. Counsel for the plaintiff on the other hand asserted that the trial judge had given due consideration to the credibility of witnesses and of the probabilities. Furthermore, he argued that the defendant had to discharge the *onus* with regard to its defence of justification and that the court had considered the defence. It was his contention that the police had made too many mistakes and had conspired against the plaintiff and falsely implicated him.

Conclusion

[50] It is trite that a party who asserts has a duty to discharge the *onus* of proof. In *African Eagle Life Assurance Co Ltd v Cainer*,[11] Coetzee J applied the principle set out in *National Employers' General Insurance Association v Gany* 1931 AD 187 as follows:

'Where there are two stories mutually destructive, before the *onus* is discharged the Court must be satisfied 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 Clarke 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 . . . .'

[11] *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 237D-H.

[51] The approach to be adopted when dealing with the question of *onus* and the probabilities was outlined by Eksteen JP in *National Employers' General v Jagers*,[12] as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[52] In the present case the plaintiff, during the trial, abandoned his main ground and pursued his claim on the basis that Ledwaba negligently discharged the firearm. It follows that the plaintiff bore the *onus* of proof and had to prove that Ledwaba had been negligent. Accordingly, the defendant no longer had a duty to prove the defence of justification as it could not raise such a defence against a claim of negligence. In the result, the plaintiff had to prove the element of negligence on Ledwaba's part in order to succeed. Regarding the question of *onus*, Spilg J remarked:

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[12] *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D. See also *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* 2003 (1) SA 1 (SCA) para 5 and *Dreyer v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at 558E-G.

'I am satisfied that after subjecting the evidence in this manner the truth is readily discernible. Moreover I am satisfied that irrespective of who was required to discharge the *onus*, the result will be the same.'

[53] I do not agree with the trial judge when regard is had to the facts. It is difficult to comprehend how the judge could make this statement unless he had pre-judged the issues. He adopted an approach that is flawed and which cannot be applied when faced with two mutually destructive versions. It was imperative for Spilg J to have been alive to the issue relating to the *onus* and to make a determination in that regard. Had the trial judge adopted a proper approach and applied the principles set out in the *Jagers* case, the result would have been different. I will hereafter show how the trial judge erred in his approach.

(a) *The issue relating to the time of the incident.*

[54] It was submitted that the plaintiff's version that the incident occurred around 22h30 was more probable and that his evidence about the time-lines were merely estimates. This argument cannot be sustained against the objective facts. There is no dispute that Mabaso and Ledwaba's shift commenced at 23h00. There is furthermore objective evidence that the paramedics were despatched at 01h30 and arrived at the scene at 01h35. They left from the scene at 02h00 and the plaintiff was admitted at the hospital at 02h10. This evidence cannot be disputed. Spilg J in his assessment of the evidence remarked as follows with regard to the time of the incident:

'However the plaintiff's recollection of time is not relevant. If he is an hour out, it makes no difference to the version he gave. It is the failure of Mabaso to account to explain how all this could have happened within 15 minutes that puts into question why they delayed in recording the time of the incident. It is a factor that I must weigh.'

[55] There is no basis for this statement. The plaintiff had a duty to discharge the *onus*. His recollection of the time of the incident was in my view an important factor. It is incorrect for the judge to state that the plaintiff's recollection in this regard is irrelevant. The plaintiff's version is clearly wrong against the background of the objective facts; that Mabaso and Ledwaba commenced duties at 23h00. They reported for duty at their office and thereafter left to conduct patrol duties. It follows that the incident could not have taken place before 23h00 but after midnight. The plaintiff wants the court to believe that, after sustaining such severe injuries, he was left unattended for more than four hours. His version of the time when the incident occurred cannot be true and has to be rejected. It also raises a further question of why he lied about the time and what he was doing. The version given by Mabaso has a ring of truth. The paramedics arrived shortly after the incident. There is nothing peculiar in Mabaso's explanation on the timeline and how the events ensued after the shooting. In the result, the trial judge erred when he accepted the plaintiff's version with regard to the time of the incident.

(b) *Number of shots fired*

[56] Both Mabaso and the plaintiff testified that they had heard three shots being fired. Pelser and Singh testified that they found three spent cartridges. The trial judge despite the absence of objective facts relied on the evidence of Maseko and that of the plaintiff that the Norinco carried nine rounds prior to the shooting and concluded that at least four or five shots had been fired. He held:

'Accordingly the mere fact that no bullet appeared to have been found by the repairer does not militate against the fact that it had not been removed after the incident and before it arrived at the repairer.

. . .

Moreover, the plaintiff's own testimony that he heard three shots fired yet confirms that there were nine rounds in the Norinco give little reason to believe that this evidence was manufactured. It is only the police photographs taken later at the scene which indicated that only four bullets remained in the Norinco's magazine after the incident.

. . .

Subject to any further contradictory evidence or anomaly I make the finding that four shots were fired by Ledwaba which explains why only four bullets were found in the magazine after the incident whereas the unchallenged evidence of the plaintiff is that he had loaded the Norinco with nine bullets and I apologise, I think there were four rounds of ammunition found and accordingly that five had in fact being fired of which at least four are accounted: two in the driver’s door and two that struck the plaintiff.'

[57] Counsel for the plaintiff, in my view, correctly conceded that there was no basis for this conclusion as the plaintiff had also stated that three rounds were fired. Accordingly there was no factual basis for this finding. It follows that the judge was obliged to accept the evidence presented by the parties and not make his own assumptions or speculate.

(c) *Injury sustained by Mabaso*

[58] It was submitted on behalf of the plaintiff that Mabaso could have sustained the injury from contact with any object when he jumped away and fell on the ground after the shots were fired. Counsel further argued that the abrasion around the eye did not appear to have been caused by a muzzle of a firearm. In this regard, reliance was placed on the conclusion of the court below, in terms of which it held:

'I however accept that I cannot account for that without speculation. In other words the fact that the firearm was pushed into his eye is not the only reasonable possible explanation for his injury. It does not accord with what was visibly seen and alleged. It required the person against whom the muzzle was placed to be moving towards the plaintiff or being stationary for such an injury to be inflicted.'

[59] This submission has no merit. Mabaso explained how he sustained the injury. It was never suggested by anybody that the injury could be self-inflicted. Accordingly, Mabaso's version on how he sustained the injury remained uncontroverted. There was some bruising around his eye. This is evident from the photographs and is consistent with his version in that regard. It follows that the judge erred when he rejected Mabaso's version of how he sustained the injury in the absence of evidence to the contrary. He should have accepted the evidence and not relied on conjecture and speculation.

(d) *Medical evidence*

[60] The judge rejected the evidence of Dr Güldenpfennig about the trajectory of the bullet. The doctor could not exclude the possibility that the bullet upon entering the plaintiff's body came into contact with the shoulder bone which would have caused the bullet to deflect and change its trajectory. It has to be borne in mind that the plaintiff was leaning forward behind the seat with his back turned at an angle to Ledwaba. The exact position of Ledwaba when he fired the rounds is unknown. But on Mabaso's version, the plaintiff was in the process of pulling Mabaso towards him whilst hitting him with the Star PD pistol. Mabaso explained that he resisted and moved backwards. It is clear therefore that this was not a static scene and this could explain the trajectory of the bullet which moved downwards. There was accordingly no basis for the judge to ignore the evidence of Dr Güldenpfennig in this regard.

(e) *Finding that Ledwaba negligently discharged the firearm*

[61] As I had mentioned earlier in the judgment, the judge concluded that Ledwaba unintentionally and negligently discharged the firearm. This

finding is however at odds with the evidence adduced before the court. There is the objective evidence that the firearm was tested at a firing range by Lurie. It was found to be incapable of firing automatically. Lurie stated that it would require a conscious act to pull the trigger and that at the very least one would have to depress the trigger every time before a round could be fired. He further stated that it would require some skill for one to fire the rounds in quick succession.

[62] In my view, it is improbable that the firearm, having regard to its inherent inability to fire uninterruptedly, was negligently discharged three times. It will be recalled that the acceptable expert evidence is that it requires conscious and deliberate action to discharge the firearm successively. The probabilities, therefore favour the defendant's version that Ledwaba could only have discharged the firearm intentionally when defending his colleague. The position of the spent cartridges as shown in the photographs was also consistent with Ledwaba approaching the Nissan and firing deliberately in defence of his colleague. The court below accordingly erred when it concluded that Ledwaba had discharged the firearm negligently as the evidence did not support such a conclusion.

(f) *Police cover-up*

[63] Counsel for the plaintiff submitted that the police conspired against the plaintiff and falsely implicated him to cover up their actions when they shot him. It has to be borne in mind that the whole incident started as a traffic offence. The metro officers happened to observe the plaintiff committing the offence and decided to execute their duties. There was no allegation that Pelser had manufactured the incident report to advance the conspiracy against the plaintiff. Nor was it ever put to Pelser that

allowing Ledwaba and Mabaso to write their statements in the same office constituted a conspiracy.

[64] For the plaintiff's version to be true, the court would have to accept that there was a conspiracy between the police and the metro officers, including Pelser, and that the whole story of the firearm had been fabricated. Pelser would have had to manufacture the evidence contained in the incident report and remove the extra rounds within an hour. The plan would have to have involved the police officers from different units and the metro officers to prepare for an uncertain event and implicate an innocent person. Mabaso and Ledwaba would have foreseen that they would encounter problems and that they would have to plant incriminating evidence against the plaintiff to exonerate themselves. The court would have to conclude that the Star PD firearm was deliberately placed in the Nissan to falsely implicate him. That version is, in my view, far-fetched and has to be rejected. The police indeed did not properly secure the scene. That however, does not indicate a police cover-up. At worst for the police, it reveals ineptitude. In the result there was no factual basis for the conclusion of the trial judge. It was not appropriate for him to speculate and find that there was a conspiracy. The probabilities are that the Star PD pistol could only have been in the plaintiff's possession and was used by him to attack Mabaso.

[65] In the result the judge misdirected himself when he failed to decide the issue of *onus* of proof and in the process disregarded the unsatisfactory aspects of the plaintiff’s evidence. He did not consider the inherent contradictions in the plaintiff’s testimony *vis a vis* his written statements to the police and Dr Güldenpfennig as well as against the objective facts. The plaintiff’s version is, on the objective facts and

probabilities, false and not sustainable. The plaintiff accordingly failed to discharge the *onus* of proof. In these circumstances, the court below erred in its conclusion when it found that Ledwaba negligently discharged the firearm. It follows that the plaintiff's claim should have been dismissed. The appeal has to succeed.

[66] In the result the following order is made:

1 The appeal is upheld with costs including those attendant on the employment of two counsel.

2. The order of the court below is set aside in its entirety and substituted as follows:

'The plaintiff's claim is dismissed with costs.'

_____

N Z MHLANTLA
JUDGE OF APPEAL

APPEARANCES

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