

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**CASE NO: HC-MD-CIV-ACT-DEL-2017/00359**

In the matter between:

**NDILYOWIKE HAISHONGA**

**PLAINTIFF**

and

**THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA  
MINISTER OF SAFETY AND SECURITY**

**DEFENDANT**

**Neutral citation:** *Haishonga v The Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2017/00359) [2019] NAHCMD 219 (03 June 2019)

**CORAM: PRINSLOO J**

Heard: 11 – 15 June 2018; 03 – 05 September 2018 and 20 February 2019

Delivered: 03 June 2019

Reasons: 02 July 2019

**Flynote:** Delictual claim – Negligence – Plaintiff shot by a gun belonging to a police officer – Negligence of a police officer walking around and handling a firearm not on a safety latch in a public place and within sight of members of the public.

**Summary:** Plaintiff instituted a claim against the defendant in that a police officer, who was acting within the course and scope of his employment with the Ministry of Safety and Security and therefor consequently employed with the defendant, allegedly unlawfully shot the plaintiff on the 27<sup>th</sup> of September 2016 in the vicinity of Okuryangava Stop and Shop Shopping Centre.

*Held* that where different versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined.

*Held further* that the police officer owed a legal duty to protect the innocent bystanders, including the plaintiff, in his capacity as a police official, but he had acted in breach of that duty (wrongfully) and had negligently caused the injuries of the plaintiff.

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## **ORDER**

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Judgment is granted in favor of the Plaintiff in the following terms:

1. Payment in the amount of N\$ 150 560.00, which is calculated as follows:
    - 1.1 Pain and suffering - N\$ 100 000.
    - 1.2 Emotional and psychological pain - N\$ 50 000.
    - 1.3 Past medical treatment and examination - N\$ 560.
  2. Interest on the aforesaid amounts calculated at a rate of 20% from date of judgment to date of final payment.
  3. Cost of suit.
  4. No order is made as to future medical expenses and operations.
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## **JUDGMENT**

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PRINSLOO J

Introduction

*Particulars of claim*

[1] This is an action for damages in which the plaintiff, Ndilyowike Haishonga, claims damages in the sum of N\$ 1 200 000 from the Government of the Republic of Namibia arising out of a shooting incident during which the plaintiff was shot and injured. The plaintiff alleges that he was unlawfully shot by a police officer, later identified as one Daniel Kashela, who was acting within the course and scope of his employment with the Ministry of Safety and Security and therefor consequently employed with the defendant. This incident took place on the 27<sup>th</sup> of September 2016 in the vicinity of Okuryangava Stop and Shop Shopping Centre.

[2] The plaintiff pleaded in his particulars of claim that as a result of this unlawful shooting, he:

- '7.1 had to undergo medical treatment and it was determined during the treatment that the bullet is very close to his heart if he is operated upon he could die;
- 7.2 was unable to work for a period of four months and is still unable to work;
- 7.3 suffered from physical pain and is still suffering from said pain more so since the bullet is still lodged in his body.'

[3] Therefore as a result of the aforesaid incident, the plaintiff claims that he suffered damages in the amount of N\$ 1 200 000, which constituted the following:

- '8.1 Pain and suffering – N\$ 100 000-00
- 8.2 Emotional and psychological pain – N\$ 50 000-00
- 8.3 Past medical treatment and examinations – N\$ 50 000-00
- 8.4 Future medical expenses and operations: 1 000 000-00'

*The plea*

[4] The defendant raised two special pleas in its plea ie, that of non-joinder and failure to serve a statutory notice in terms of sec 33 (2) of the Public Service Act, 1995. These pleas were however abandoned.

[5] The defendant denied any liability and further denied that the plaintiff was unlawfully shot due to the negligence or intention of the defendant or any of its employees.

*Pre-trial order*

[6] In the pre-trial order the issues of fact the court was called upon to adjudicate were the following:

- '1.1 Whether on or about 27 September 2016 a police officer on duty was involved in a scuffle with a suspect at Stop and Shop market.
- 1.2 Whether the Plaintiff was unlawfully shot with a firearm by a member of the Namibian Police Force on or about 27<sup>th</sup> September 2016.
- 1.3 Whether the Plaintiff was unlawfully assaulted by members of the Namibian Police Force in public and within sight of the members of the public.
- 1.4 Whether as the result of the assault, the plaintiff had to undergo medical treatment and it was determined during treatment that the bullet is very close to his heart and if he is operated upon he could die as a result of the defendant's unlawful assault;
- 1.5 Whether the Plaintiff was employed and was unable to work for a period of four months and is still unable to work as a result of the defendant's unlawful assault;
- 1.6 Whether the plaintiff suffered from physical pain and is still suffering from said pain as a result of the unlawful assault by the defendant;
- 1.7 Whether as a result of the defendant's unlawful assault the plaintiff suffered damages in the amount of N\$ 1 200 000.'

[7] The issue of law to be resolved at the trial was whether or not the defendant was negligent.

[8] The following facts appear to be common cause between the parties and not in dispute as per the pre-trial order:

- '3.1 The citation of the parties;
- 3.2 The jurisdiction of the court to entertain the matter;
- 3.3 On or about 27 September 2016 A police officer while on duty was involved in a scuffle with a suspect who grabbed a cellphone from a member of the public;
- 3.4 A gun shot went off from a police officer pistol and the bullet hit the Plaintiff who was lying at the back of an Iveco Bus;
- 3.5 A Police Criminal Investigation into the Case was conducted and two case dockets were opened at the Wanaheda Police Station under WANAHEDA CR 753/09/2016 – Theft from Person and WANAHEDA CR 758/09/2016 – Assaulting a Police Officer on duty and resisting arrest, respectively.'

#### Evidence adduced

##### *On behalf of the plaintiff*

[9] The plaintiff testified himself and also called four witnesses to testify on his behalf, namely Mr Abraham Djulume, the former employer of the plaintiff, Dr Aron Hamupembe, who appeared on subpoena and Dr Shaun Whittaker and Dr Nadine Agnew, in their capacity as experts.

##### *Ndiliyowike Haishonga*

[10] The plaintiff's evidence was that on 27 September 2016 at Okuryangava Stop and Shop shopping centre and at around 15h00 he was lying at the back seat of an Iveco bus which was parked and being fixed by an auto electrician. He was on the bus in his capacity as the Conductor overseeing the repairs.

[11] According to the plaintiff, while he was lying at the back of an Iveco bus, he heard commotion from outside, which prompted him to raise his head and observe what was going on. He testified that he could see a young boy (herein referred to as the suspect) running away very fast, being chased by several security guards and

civilians. He also observed a police officer, whom he later came to know as Daniel Kashela (herein referred to as Mr Kashela), also chasing after the suspect whilst holding a firearm in his hand. The suspect continued running but Mr Kashela and the security guards managed to catch him round about 5 metres from where the plaintiff was. During cross-examination the distance was however confirmed to be ± 3 metres.

[12] The plaintiff also testified that the suspect was struggling, making attempts to run away and that Mr Kashela was trying to detain him with his one hand while holding a firearm in the other. The Plaintiff testified that from his observation Mr Kashela held the firearm at all material times and that at no point did he observe the firearm going into the suspect's hand.

[13] The plaintiff further testified that after a few seconds he felt that something hit his body with great force, which left him unable to breath. He further testified that at that point in time he knew that he was shot. He felt extreme pain and was in shock. He remember holding his chest and walking out of the bus slowly towards where Mr Kashela was standing and he informed Mr Kashela that he had shot him. Mr Kashela then stopped a taxi and rushed the plaintiff to the nearby Okuryangava Clinic. The plaintiff was at all times conscious and aware of his surroundings. It is the plaintiff's further testimony that Mr Kashela kept apologising to him as to how sorry he was and how he made a mistake when he accidentally shot the plaintiff. The Plaintiff further confirmed during cross-examination and re-examination that he actually saw Mr Kashela pulling the trigger of the firearm.

[14] It was the plaintiff's evidence that when he and Mr Kashela arrived at the clinic, Mr Kashela informed the nurses that he accidentally shot the plaintiff. The plaintiff was then examined and thereafter transferred by ambulance to the casualty ward at Katutura State Hospital. Mr Kashela and a registered nurse from the clinic accompanied the plaintiff in the ambulance. Upon arrival at the hospital, Mr Kashela informed the nurse and a doctor Hamupembe, who were attending to the plaintiff, that he accidentally shot the plaintiff while trying to apprehend 'a robber'. This information was recorded in the plaintiff's health passport on 27 September 2016 and in support of his testimony, the plaintiff handed in as exhibits extracts from his health passport.

[15] Thereafter the plaintiff was sent for x-rays to determine the location of the bullet in his body as there was no exit wound. He testified that he was admitted in hospital from the 27<sup>th</sup> of September 2016 to 8<sup>th</sup> of October 2016 during which period several medical procedures were carried out on his body. Subsequently he was informed that the bullet could not be removed because of the risk that the surgery could cause in damaging major organs during the surgery procedure.

[16] The witness testified that since the time of the incident he suffered from extreme pain from the bullet still lodged in his body and medical procedures he had to undergo. As a result of the constant pain he has become heavily dependent on painkillers to manage the pain, which he has to purchase at a fee of N\$ 70 per week. He further testified that upon his discharge at the hospital he had to pay an amount of N\$ 560 for treatment. Proof of the N\$ 560 was handed into evidence. Plaintiff further testified that before he was shot he was employed as a bus conductor and the work involved a lot of hard labour and after he was shot he could no longer carry out those duties because of the pain.

[17] The plaintiff further testified that he experiences recurring nightmares of the shooting, and that his night terrors leaves him in a state where he cannot sleep at night and that when he is awake he finds his thoughts drifting to that day that he was shot.

[18] The plaintiff further stated that after his discharge from the hospital Mr Kashela used to call him to find out how he was and apologising and admitting that he is the one that shot the plaintiff.

[19] During cross-examination the plaintiff was confronted with a statement obtained from him whilst in hospital on 29 September 2016. According to the witness the statement was recorded by a certain Mr Yapwire Amadeus from internal investigations within the Namibian Police. In this statement it was recorded that the plaintiff did not see who pulled the trigger during the incident when he was shot. The witness denied the contents of the specific paragraph and stated that he never gave such information to Mr Amadeus Yapwire. He further stated that he gave his

statement in the Oshiwambo language, which was subsequently written down and was never read back to him.

[20] When confronted with Mr Kashela's version that the suspect had two knives in his hands and managed to grab the firearm from its holster and that the suspect was the one who fired the shot, the plaintiff replied in no uncertain terms that this evidence is untrue. The plaintiff denied that the suspect had any weapons with him and further stated that it is impossible that the suspect, while wrestling with Mr Kashela and holding two knives in his hand, managed to use the same hands to unfasten the holster, grab the firearm, remove it from safety and fire the shot. The plaintiff remained adamant that it is Mr Kashela who shot him because when the plaintiff moved out of the bus and walked straight to him, he admitted that he shot the plaintiff.

*Abraham Djulume*

[21] Mr Djulume testified that he is the owner of the bus on which the plaintiff was working as a conductor. The plaintiff was employed as from 2 January 2014 but that his contract of employment ended the month after the plaintiff was discharged from the hospital. He further testified that the plaintiff was earning N\$ 4650 per month and tendered a pay slip for the month of September 2016 as evidence.

[22] The witness further testified that since the shooting the plaintiff is withdrawn and always lost in thought and that he struggles to conduct duties which he could do with ease before the incident. Because of the difficulty that the plaintiff experienced in conducting his duties, the witness testified that he had to make a decision for the plaintiff to stop working because the work required carrying heavy material, and which, from his own observation, the plaintiff was unable to fully carry out.

*Aron Hamupembe*

[23] Doctor Hamupembe is a qualified medical officer and he was the doctor that examined the plaintiff at the Katutura State Hospital causality ward *after* the plaintiff was transferred from the Okuryangava Clinic. He recorded his observation of the

plaintiff in the plaintiff's health passport as well as in the J88, which documents were handed in as exhibits.

[24] Doctor Hamupembe testified that the information he recorded in the health passport he received it from the casualty nurse who attended to the plaintiff upon his arrival at the hospital. She in turn received the said information from the nurse from Okuryangava clinic, who accompanied the plaintiff. After obtaining the history of the plaintiff (the background information) the witness examined the plaintiff and also recorded his findings in the J88.

[25] Dr Hamupembe could neither confirm nor deny whether Mr Kashela was the one who gave the background information regarding the shooting incident. He also cannot recall whether Mr Kashela was in the emergency room.

[26] In respect of his medico-legal findings the witness testified that when he examined the plaintiff he noticed that the plaintiff had a one centimetre entry wound on the right midaxillary line in the costal space, in other words on his right armpit. There was no exit wound. There was only an entry wound. This meant that the bullet was trapped somewhere in the chest. He further testified that when the plaintiff was brought to the hospital he was on oxygen.

#### *Nadine Agnew*

[27] Doctor Agnew is a qualified and practising medical practitioner and testified that she saw and consulted the plaintiff on 19 October 2016 where after she prepared a report based on the consultation and her own examinations. She testified that based on information she received from the plaintiff and documentation before her, she observed that the plaintiff suffered from a gunshot wound to his medial biceps muscles into the right hemithorax, in other words on his right armpit. The projectile<sup>1</sup> penetrated and fractured the right third rib laterally and lodged in the tissue in the right hemithorax. She further testified that the projectile was not removed as there was no surgical indication to do so at the time. The projectile could be seen on the chest x-ray of the plaintiff. However, the witness could not testify as

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<sup>1</sup> A missile designed to be fired from a gun.

to the exact location of the projectile. Furthermore, she testified that the plaintiff complains of pain whenever he lifts heavy objects.

*Shaun Whittaker*

[28] Doctor Whittaker is a qualified and practicing clinical psychologist and testified that he saw and consulted the plaintiff on 26 July 2017 where after he prepared a report based on the consultation and other subsequent consultations. His testimony is that based on the information provided to him by the plaintiff and based on his own observation and assessment, the plaintiff is suffering from Post-Traumatic Stress Disorder (PTSD) as manifested by the following symptoms:

- (a) He experienced an event that involves a serious threat to his life;
- (b) He experiences intense fear and helplessness;
- (c) He suffers from nightmares;
- (d) He has flashbacks and ruminations;
- (e) He has a sense of foreshortened future;
- (f) He has diminished interest in significant activities;
- (g) He has restricted range of affect;
- (h) He experiences difficulties falling asleep;
- (i) He has lowered concentration.

[29] He testified that he observed symptoms of Major Depression which included depressed mood, decreased appetite and reduced energy. He further testified that the plaintiff's conditions are escalated by the fact that the bullet is still lodged in his body near the heart and he fears that he could die anytime and the fact that he is unemployed as a result of the injury.

[30] The witness testified that PTSD is a fairly severe anxiety disorder, however it is one that is treatable by psychiatric medication and also by psychotherapy where people can not only express what they have gone through but also process the various emotions that would be linked to the trauma.

*On behalf of the defendant*

[31] The defendant called eight witnesses to testify on its behalf, namely Mr Yapwire Amadeus, Mr Embasu Max Nkumbo, Ms Esther Nana Awuku, in her capacity as an expert, Mr Amunyela Mena Hango, Mr Tomas Abraham, Mr Daniel Kashela, Ms Abed Petrina and Mr Amadhila Gabriel.

### *Yapwire Amadeus*

[32] Mr Yapwire is an investigator that is attached to the Internal Investigation Unit of the Namibian Police for the Khomas Region. He testified that on 27 September 2016, while he was on standby duty, he received a call about a shooting incidence at Okuryangava Stop and Shop that allegedly involved a police officer. Upon arrival at the scene, Mr Yapwire found people standing next to an Iveco bus and from his enquiries he determined that a man (the suspect) apparently grabbed a cell phone from a lady and ran away, where after a uniformed policeman gave chase and after a struggle with the suspect a shot was fired. He also testified that he took statements from the people that observed the incident and subsequently after consultation with the plaintiff a police docket was opened<sup>2</sup>.

[33] The witness testified that while talking to the people he found standing next to the bus, a man in uniform approached him and introduced himself as Constable Kashela, who proceeded to explained to him what had transpired. From his investigation he determined that the duty firearm which was in the possession of Mr Kashela was already cocked and thus ready to be fired, before he came to the scene.

[34] According to the witness Mr Kashela reported that during the course of a struggle with the suspect the suspect managed to pull the trigger and a shot went off. The witness further testified that Mr Kashela denied ever having pulled the trigger of the pistol.

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<sup>2</sup> During testimony it actually came out that three dockets were opened, namely Wanaheda CR 818/09/2016 – Attempted Murder, Wanaheda CR 753/09/2016 – Theft from Person and Wanaheda CR 758/09/2016 – Assaulting a Police Officer while on duty. The one referred to in this matter is Wanaheda CR 818/09/2016 – Attempted Murder.

[35] Mr Yapwire was asked during cross-examination how one cocks a firearm for it to be ready to shoot and whether there was a 'safety pin' on the firearm. He explained that once the firearm is removed from the holster it can be ready to shoot by switching the safety latch from 'on' to 'off' where after the firearm will be ready to fire. He confirmed that the firearm had a safety latch.

[36] It was the witness's further evidence that he took the firearm that was used in the incident from Mr Kashela and that they searched for the spent cartridge at the scene but they could not find it. The knife(s) that the suspect allegedly had was also not recovered. He further testified that upon his arrival at his office he placed the firearm on safety and found one used cartridge stacked in the chamber of the firearm.

[37] Mr Yapwire testified that based on the witness statements obtained he ruled Mr Kashela out as a suspect in the matter and thereafter the docket was transferred to Wanaheda Police Station. Mr Yapwire stated that although the firearm was sent for forensic tests the results were not available and he did not rely on same in reaching a conclusion. On questions of the court the witness confirmed that no gun residue tests were done on either Mr Kashela or the suspect nor was the firearm tested for any finger prints. Mr Yapwire further conceded that his conclusion that Mr Kashela was not the one who shot the plaintiff was premature, in light of the outstanding results of the forensic tests.

[38] When the witness was asked about the applicable standard police procedure on whether a police officer is allowed to walk around with a cocked firearm he testified that to his knowledge the firearm should be ready to shoot ie it should be removed from the holster when it is necessary because it is not safe to walk around with a cocked firearm as it is dangerous as one might accidentally touch the trigger and injure oneself or the next person.

*Esther Nana Awuku*

[39] Ms Awuke is a qualified and practicing clinical psychologist and testified that she consulted the plaintiff on 11 and 12 September 2017 where after she prepared a

report based on the consultations. Her conclusion based on her report were similarly the same as that with Doctor Whittaker, in that the plaintiff suffered from Post-Traumatic Stress Disorder and Major Depressive Disorder. She also confirmed that the condition of the plaintiff is one that is treatable by medication and also by psychotherapy.

*Embasu Max Nkumbo*

[40] Mr Nkumbo testified that on the day of the incident and while on duty he heard ladies calling for help. They pointed to the suspect who was running from a certain shop. The witness together with Mr Kashela who was found in the vicinity gave chase to the suspect. It was his evidence that the suspect had two knives in his hands. It was his further evidence that Mr Kashela shot a warning shot in the air and the suspect jumped to grab hold Mr Kashela's arm that was holding the firearm and started wrestling with Mr Kashela in order for him to get hold of the firearm. The suspect managed to get to the trigger of the firearm, pulled the trigger and a shot went off which struck the bus. At this point in time the witness was ± nine metres from Mr Kashela and the suspect. The witness testified that he immediately rushed to Mr Kashela and the suspect and grabbed the suspect by the arm that was holding the firearm. The witness managed to twist the suspect's small finger on his right hand in order for him to surrender the firearm, which he did.

[41] The witness thereafter saw the plaintiff coming out of the bus with a wound on his right claiming that 'we shot him'. The witness then handcuffed the suspect with the assistance of another security guard and took him to Wahaneda Police Station.

[42] During cross-examination the witness testified that Mr Kashela only took out his firearm when the suspect turned against him and that is the time he fired the warning shot in the air and thereafter placed the firearm back in the holster. The witness stated that approximately half an hour lapsed between the discharge of the warning shot and the shot that strike the plaintiff. He further testified that the suspect was the one who pulled the trigger because he took the firearm from the holster while he was holding the one knife in one hand and while he was fighting Mr Kashela for the firearm as he had placed the other knife in his pocket. According to the witness Mr Kashela was trying to handcuff the suspect during the struggle.

[43] The witness was asked to explain which direction the bus was stationed from where he was standing and where Mr Kashela and the suspect were standing and he testified that Mr Kashela and the suspect were facing the bus while the witness was behind Mr Kashela and that the suspect was pointing the gun towards the direction of the bus.

*Amunyela Mena Hango*

[44] Mr Hango's evidence was that on the day of the incident he saw the suspect running while being chased by public members and security guards. He could see the suspect holding a knife. He joined the chase to which Mr Kashela also joined. The witness managed to grab the suspect and they fought for a while and he disarmed the suspect of the one knife. Mr Kashela grabbed the suspect from the witness and the suspect took out his second knife and used it to injure Mr Kashela on the face. The suspect then grabbed the firearm which was in Mr Kashela's hands and the two started fighting for it and in the process the suspect pulled the trigger and a shot went off hitting the bus and subsequently injuring the plaintiff. The witness further testified that a single shot was discharged and that it was the suspect that pulled the trigger but that both the suspect and Mr Kashela were holding the firearm. He testified that when the trigger was pulled he was ± one to two metres away from Mr Kashela and the suspect.

*Tomas Abraham*

[45] The witness testified that on the day of the incident he was in the bus at the driver's side fixing the head lamp wires. He heard people making noise outside the bus and checked, while in the bus, to see what was going on and he noticed people running towards the bus. He also noticed the suspect running followed by Mr Kashela. He further noticed that the suspect was having a knife in his right hand and wanted to stab the police officer, however the police officer grabbed him on the left arm. He also testified that there was a struggle between the suspect and Mr

Kashela. The witness further testified that he saw that Mr Kashela was having a firearm in the holster but never saw either Mr Kashela or the suspect taking the firearm out of the holster. He only heard the sound of a gunshot and he confirmed that it was the plaintiff who was shot and that he was taken to the hospital in a taxi by Mr Kashela.

*Daniel Kashela*

[46] Mr Kashela testified that on the day of the incident he was called by a security guard<sup>3</sup> to assist in chasing and catching the suspect. Mr Kashela stated that when he caught the suspect he noticed that the suspect had two knives in his hands. The suspect saw Mr Kashela's firearm in the holster and he made a grab for it and the two started wrestling for the firearm. Mr Kashela managed to kick down the knife that was on the suspect's left hand and subsequently also managed to hold the suspect on his right hand until that knife fell down. He pushed the suspect down and when the suspect got up he grabbed the firearm from the holster which was on the right side of the witness's body. The suspect was holding the butt of the firearm close to the trigger and the witness was holding on to the barrel of the firearm. Mr Kashela testified that he was trying to push the firearm down while at the same time the suspect attempted to pull it up and out of the witness's hand. He further testified that the people that were surrounding them then shouted 'watch out, his finger is on the trigger'.

[47] While fighting for the firearm the suspect nearly overpowered Mr Kashela and according to the witness the suspect turned the firearm into his direction while holding on to the trigger. The firearm went off and almost hit Mr Kashela in his abdomen. The suspect only let go off the firearm when the shot was fired. Thereafter the security guard<sup>4</sup> assisted Mr Kashela in handcuffing the suspect

[48] The witness further stated that when the shot was fired the bus was behind him, meaning he was facing in the opposite direction and that the suspect was facing the bus.

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<sup>3</sup> Herein Mr Embasu Max Nkumbo.

<sup>4</sup> Supra note 3.

[49] Shortly after the shot was fired the plaintiff came out of the bus bleeding and holding himself and said that he was shot. After some inspections the witness realised that the projectile went through the bus and hit the plaintiff who was at the back of the bus. The witness then rushed the plaintiff to Okuryangava Clinic.

[50] The witness was asked during cross-examination whether the firearm's safety latch was on prior to the shooting incident and the witness testified that the firearm does not have a safety latch<sup>5</sup>. He explained that the moment a person pulls the trigger, the firearm will fire automatically. The firearm was an older model firearm that did not have a safety latch. Whether the firearm was cocked or not it is always ready to fire.

[51] When the witness was further asked during cross-examination whether the firearm had a safety latch and whether he ever used it, the witness responded that he thinks it has a 'safety pin' and thinks he has used it before. He also confirmed that when the firearm is in the holster it is always having a 'safety pin' on. He further testified that the day of the incident the gun was on the 'safety pin', however, whether it is on a 'safety pin' or not, once the trigger is pulled, the firearm will discharge a bullet.

[52] It was also put to the witness that Mr Yapwire testified that it is not safe to walk around with a firearm that is already cocked as one could injure himself or others and that it is also not standard police procedure to walk around with a cocked firearm. Mr Kashela confirmed this position and also confirmed that it is a policy of the Police Force that one has to keep the gun in a safe place, be it in the holster or on a 'safety pin' so that it does not cause harm to others.

[53] Regarding the events after the shooting incident Mr Kashela testified that when he left the scene to take the plaintiff to the clinic, the plaintiff was not in a good condition as he was bleeding and becoming weak.

[54] The witness testified that he was the one that informed the nurses at the clinic as well as the doctor at the hospital that he and the suspect were fighting and during the fight the bullet was discharged from the firearm which hit the plaintiff who was

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<sup>5</sup> The witness referred to the safety latch as a 'safety pin'.

seated in the bus. This information was conveyed by the witness as the plaintiff could not speak. However the witness testified he did not inform the nurses that he was the one that shot the plaintiff.

[55] The witness also confirmed the plaintiff's version that he has been in contact with the plaintiff after the incident but denies that he had apologised to the plaintiff for accidentally shooting him.

*Abed Petrina*

[56] The witness testified that she and one of her colleague started running following the suspect after he stole a phone from one of her other colleague<sup>6</sup>. The witness then shouted for help where after people started running after the suspect. The witness and her colleague decided to take a different route from the one that everyone else was taking in an attempt to catch the suspect. They finally caught up with the suspect in a river bed and her colleague tried to grab him however he had two knives and wanted to stab the colleague. She further testified that there was a man in front of the suspect coming from the direction to which the suspect was running to, who managed to grab the suspect. Meanwhile Mr Kashela also came to help and managed to grab the suspect. At that time the suspect was still having two knives and started fighting with Mr Kashela, who was trying to get hold of the knives. The witness then heard Mr Kashela telling the suspect to leave the firearm. Thereafter she heard a gunshot. She then saw the plaintiff coming from the bus screaming 'you shot me'. She however testified that she did not see exactly how the shot went off and did not see who pulled the trigger.

*Amadhila Gabriel*

[57] Mr Gabriel testified that he was sitting in the bus waiting for the mechanic to finish operating the bus when he saw the suspect running and people following behind him. He further testified that Mr Kashela was also among the people that were chasing the suspect who managed to grab him. It was his further evidence that he saw, through the window of the bus, Mr Kashela and the suspect fighting. He then stood up to go assist Mr Kashela but just before he left the bus he heard a gunshot.

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<sup>6</sup> The complainant whose phone was stolen by the suspect.

He then heard the plaintiff, who was sitting at the back of the bus, screaming ‘you shot me’ and the witness noticed that the plaintiff was shot on the right side of his body. It was his evidence that he did not see who fired the shot.

### Burden of proof

[58] In civil cases, the plaintiff has the burden of proving his case. The burden of proof describes the standard that a party seeking to prove a fact in court must satisfy to have that fact legally established. It is a well-established principle in our law that the plaintiff must prove its case on a balance of probabilities. The burden of proof in civil cases has been propounded in many cases and has been stated to be as follow:

‘[I]n general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt . . . for, in finding facts or making inferences in a civil case, it seems to me that one may . . . by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.’<sup>7</sup>

### Evaluation of the evidence

[59] It is apparent from the versions of the plaintiff and the defendant, as outlined above, that they are mutually destructive.<sup>7</sup>

[60] With regard to mutually destructive evidence Parker AJ cited with approval in *Mungunda v Wilhelmus*<sup>8</sup> the case of *National Employers' General Insurance v Jagers*<sup>9</sup>, wherein Eksteen AJP states the approach courts in civil proceedings ought to follow where there are two mutually destructive accounts. Eksteen AJP stated that:

‘...Where there are two mutually destructive stories, [the Plaintiff] can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and

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<sup>7</sup> *Ndeitunga v Kavaongelwa* (I 3967/2009) [2016] NAHCMD 99 (11 April 2016) para 72. See also *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-D: Cited with approval in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Mega-Built v Kurz* 2008 (2) NR 775 (SC) at 790A-C.

<sup>8</sup> (I 2354-2014) [2015] NAHCMD 149 (25 June 2015) para 12.

<sup>9</sup> 1984 (4) SA 437 (E) at 440E-F.

accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false and mistaken and falls to be rejected' In deciding whether that evidence is true or not, the Court will weigh up and test the Plaintiffs 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 Plaintiffs 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.'

[61] In *Life Office of Namibia Ltd v Amakali*<sup>10</sup> the court cited with approval to *Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others*<sup>11</sup> where Nienaber JA discussed the technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions as follows:

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarized 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 variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour; (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (vi) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events . . .'<sup>12</sup>

[62] One takes from this dicta the cue that where versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined. This endeavour is not to be equated with box-ticking; the constituent parts of the exercise are indicated merely to underscore the breadth of the field to be

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<sup>10</sup> *Life Office of Namibia Ltd v Amakali* the court referred with approval to *Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others* 2014 NR 1119 (LC) at 1129-1130.

<sup>11</sup> 2003(1) SA 11 (SCA).

<sup>12</sup> Para 5.

covered. The focal point of the exercise remains to find the truth of what had happened; these considerations are markers along the way<sup>13</sup>.

[63] I have had the opportunity to observe, hear and assess the number of witnesses testifying on behalf of the plaintiff and the defendant. I will therefore proceed to deal with the evidence presented to this court by both parties, with a view to deciding on their credibility and which of the irreconcilable versions adduced the court should lend credence to.

[64] In coming to a conclusion on this matter, the court will put to use the methods suggested by the court in the *Amakali* matter, or those of them that may prove applicable to the case at hand.

#### *Plaintiff's case*

[65] The plaintiff made a good impression on the court. The plaintiff's evidence was consistent, and he came across as a credible witness and he stood up well during cross-examination by Mr Kashindi. Some criticism can be levelled at the plaintiff's evidence however in general his version of the facts was also inherently probable. During his evidence the plaintiff testified that when he heard the commotion outside he sat up to see what was going on, which is a natural thing to do. He confirms that he saw the chase and once the suspect was apprehended he saw the suspect struggling and making attempts to run away. However, the plaintiff testified that Mr Kashela was trying to detain the suspect with his one hand while holding a firearm in the other. The plaintiff was adamant that from his observation Mr Kashela held the firearm at all material times and that at no point was the firearm transferred into the suspect's hand.

[66] When he exited the bus after the shot was discharged, the plaintiff spoke to Mr Kashela and stated that he shot him. He did not say that he was shot by the

<sup>13</sup> *South African Bank of Athens v 24 Hour Cash CC (A3027/2016) [2016] ZAGPJHC 217 (11 August 2016)*.

suspect as suggested by Mr Kashela. Mr Kashela's denial in this regard does not tie in with what he informed the medical personnel subsequent to the shooting incident.

[67] After the incident Mr Kashela immediately arranged for a taxi to take the plaintiff to the clinic and interestingly Mr Kashela then informed not only the taxi driver but also the nurse at the Okuryangava Clinic that he accidentally shot the plaintiff. This information was then recorded by the nurse in the plaintiff's health passport. This was in turn related to the casualty nurse at the Katutura State Hospital. Mr Kashela went further and informed the medical personnel that the incident happened in an attempt to apprehend a robber. The plaintiff at that point had no knowledge of a robbery and would not be able to furnish this information. Furthermore, once discharged from hospital Mr Kashela called the plaintiff to apologize for the incident.

[68] On face value the plaintiff's version appears to stand in isolation. However his evidence is supported by the recordal in his health passport and the information disclosed to the medical personnel. The nurse had to get the information from somewhere and it was not from the plaintiff who was apparently getting weaker by the moment after the shooting. The information was furnished by Mr Kashela, in spite of his later denial thereof.

[69] Another issue I will place into the equation is that the general probabilities favour the plaintiff's version. As I will endeavour to show as well, some aspects of the defendant's version seemed to unwittingly corroborate the plaintiff's version. The said discussion will follow hereunder.

[70] The further witnesses called on behalf of the plaintiff who testified on the medico-legal issues were all competent witnesses and their evidence stands unchallenged. In fact the evidence of Dr Whittaker was confirmed by the evidence of Ms Awuku.

#### *Defendant's case*

[71] Having regard to the defendant's case I can say without fear of contradiction that I have heard as many different versions of what happened on the date in question as there were eye witnesses called to testify on behalf of the defendant.

[72] The main arrow in the defendant's quiver is Mr Kashela but unfortunately his evidence was not corroborated by the rest of the witnesses. There are multiple contradictions between the evidence of Mr Kashela and the aforementioned witnesses. The contradictions do not only relate to what happened prior to the accosting of the suspect but also what happened during the struggle, which led to the subsequent firing of the shot.

[73] Mr Kashela did not impress as a witness. He contradicted himself on a number of issues and more specifically regarding the way in which the suspect allegedly dispossessed him of his firearm and how the suspect fired the shot. In other respects, which I will discuss shortly, Mr Kashela was deliberately vague.

[74] I proceed to evaluate the defence witnesses' evidence and point out where applicable the inconsistencies in the defendant's version:

*Daniel Kashela*

[75] Mr Kashela describe a scene where he stated that when he caught the suspect he noticed that the suspect had two knives in his hands. He then proceeded to explain how the suspect saw the firearm and a struggle ensued for the firearm, whilst the suspect had two knives in his hands.

[76] Mr Kashela's explanation regarding the struggle between him and the suspect does not make much sense. According to Mr Kashela the suspect had a knife in each hand when he made a grab for the firearm. The suspect clearly had no free hands to grab the firearm. I found it interesting how a struggle ensued where the suspect had a knife in each hand and therefore had no clear hands to make a grab for Mr Kashela's firearm. Mr Kashela then apparently kicked the one knife from the suspect's hand. This also makes no sense because this was a struggle within close quarter and it is not clear how Mr Kashela managed to execute this kick. Then when

the suspect was dispossessed of the one knife the suspect without much trouble manage to remove a firearm secured in the holster of Mr Kashela. It is not clear how the suspect managed to do so. At the time that the shot was fired Mr Kashela held on the barrel of the firearm whilst facing the suspect with the bus behind his back, wherein the plaintiff was in at that point in time. This blow by blow evidence does not add up.

[77] The witnesses called, to corroborate the version of Mr Kashela, were the following:

*Embasu Max Nkumbo*

[78] His evidence was that:

- (a) Mr Kashela shot a warning shot in the air where after Mr Kashela returned the firearm to the holster. However none of the witnesses testified that a warning shot was fired.
- (b) The suspect jumped to grab hold Mr Kashela's arm that was holding the firearm and started wrestling with Mr Kashela in order for him to get hold of the firearm and that the wrestling apparently went on for about half an hour.
- (c) The suspect apparently managed to get to the trigger of the firearm, pulled the trigger and a shot went off which struck the bus but interestingly enough this witness was standing behind Mr Kashela and the suspect. It is not clear how he managed to see the suspect pulling the trigger. It would appear that the witness surmised that the suspect pulled the trigger as he allegedly took the gun from the holster.
- (d) After the suspect pulled the trigger he dispossessed the suspect of the firearm by literally prying his fingers of the firearm.

*Amunyela Mena Hango*

[79] His evidence was that:

- (a) He managed to grab the suspect and they fought for a while and he disarmed the suspect of the one knife.

- (b) Mr Kashela then allegedly grabbed the suspect from the witness and the suspect took out his second knife and used it to injure Mr Kashela on the face.
- (c) The suspect then made a grab for the firearm of Mr Kashela which was in Mr Kashela's hands and they started fighting for it.
- (d) A single shot was discharged and that it was the suspect that pulled the trigger but that both he and Mr Kashela were holding the firearm.

*Abed Petrina*

[80] Her evidence was that:

- (a) She and a colleague gave chase and finally caught up with the suspect in a river bed and her colleague tried to grab the suspect however he had two knives and wanted to stab the colleague.
- (b) There was a man in front of the suspect coming from the direction to which the suspect was running to who managed to grab the suspect. Meanwhile Mr Kashela also came to help and managed to grab the suspect.

[81] The court got the distinct impression that some of the witnesses that testified wanted to be the main character in the drama that played out that day and it is in this light that they related to this court what happened that day.

[82] These witnesses' evidence did not take the matter any further and because of the many inconsistencies the court cannot rely on it.

[83] Messrs Thomas Abraham and Gabriel Amadhila could not assist as they did not see how the shot was fired.

[84] The one witness whose evidence deserve some more discussion is that of Mr Kashela. As indicated earlier his evidence was inconsistent with that of the other witnesses and he was particularly vague when he was questioned about the firearm that was in his possession. Contrary to the evidence of Mr Yapwire Mr Kashela denied that the firearm was already cocked when he arrived on the scene. He stated however that the firearm could not be placed on safety mode, either because of the

fact that the safety latch did not work or that the firearm did not have a safety latch. The witness was very vague in this regard.

[85] I must accept that the firearm had a safety latch as Mr Yapwire, who was the internal investigator, testified as much when he was pertinently questioned in this regard. It was also the evidence of Mr Yapwire that it was standing instructions that the firearm's safety latch must be on at all material time until such time that the official in whose possession it was, was required to use the said firearm. The explanation for taking this precaution was simple. Mr Yapwire stated that if the firearm was not on safety mode a round can be discharged accidentally injuring not only the holder of the firearm but also bystanders.

[86] Mr Kashela testified that he was always issued with this firearm and well knowing that there was an issue with the safety of the firearm he did not deem it necessary to report it to his superiors. In fact he went as far as to say he was of the opinion that this firearm that was in a state of readiness to fire at all material times did not pose any danger to him or anybody else.

[87] The facts and the evidence of Mr Yapwire shows a different picture. Mr Yapwire clearly stated that Mr Kashela informed him that the firearm was cocked when he came to the scene of the incident. I can find no reason for Mr Yapwire to tell the court any untruths in this regard. He did not even know Mr Kashela before the incident and the information that Mr Yapwire disclosed to this court was not information that he would have had personal knowledge off unless it was disclosed to him by Mr Kashela. I must also add at this point that Mr Yapwire volunteered this information without any prompting by either counsel in this matter.

[88] Furthermore, at the end of a brief investigation, Mr Yapwire actually vindicated Mr Kashela from any wrongdoing by making a decision that Mr Kashela was not liable in this matter and transferred the docket to Wanaheda Police Station for investigation to continue against the suspect on a charge of attempted murder. It however became crystal clear during the evidence of Mr Yapwire that that decision was premature as the investigation in respect of the shooting and Mr Kashela's role therein was not completed yet as none of the forensic reports were available yet. I am hard pressed to understand how, in light of the contradictory versions of the eye

witnesses and the absence of the forensic reports, Mr Yapwire could reach this decision in favour of Mr Kashela. In conclusion on this point I am quite satisfied that Mr Kashela came on to the scene and gave chase to the suspect with a firearm that was already cocked and that firearm remained as such until the shot was fired injuring the plaintiff.

[89] On the issue of the disclosures made to the nursing staff at the Okuryangava clinic, the taxi driver, the nursing staff at the hospital and the subsequent apologies tendered by Mr Kashela, which he subsequently denied, I can remark that this is a classical incident where Mr Kashela disclosed certain information whilst in shock directly after the incident and then later when he had time to think about the consequences that might follow from the incident he made a turnaround and denied ever having said any of the above information. The same applies to his version of what exactly happened that day of the shooting.

#### The law and application of the law to the facts

[90] In terms of the law of delict, when a person causes another to suffer damage, it is insufficient to constitute a delict for which he or she may be liable. There are certain requirements which must be met in order to succeed in a claim for delictual damages. There are five requirements (or elements) necessary for delictual liability, namely:

- (a) Conduct
- (b) Wrongfulness
- (c) Fault (intention or negligence)
- (d) Causation
- (e) Damages

[91] These requirement and the principles thereto is trite and have been discussed at length in the relevant authorities, which I do not intend to repeat. The requirements that would however need further discussion is wrongfulness and fault.

#### *Wrongfulness*

[92] Wrongfulness or unlawfulness is that quality of damage-producing activity which makes it an actionable delict. An act that causes injury to another, or death, is *prima facie* wrongful<sup>14</sup>. I am of the opinion that there are no other matters of policy that should operate against that principle in this case.

[93] The only issue to be determined, therefore, is whether Mr Kashela's conduct was negligent.

### *Negligence*

[94] The criterion adopted by our law to establish whether a person has acted carelessly thus negligently is the objective standard of the reasonable man or *diligens paterfamilias*. The test for negligence was laid out authoritatively in the famous case of *Kruger v Coetzee*<sup>15</sup> whereby Holmes AJ held that:

'.... For the purposes of liability *culpa* arises if –

- (a) a *diligens paterfamilias* in the position of the defendant-
  - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
  - (ii) would take reasonable steps to guard against such occurrence,
- (b) the defendant failed to take such steps.'

[95] The issue of negligence was further discussed as follows by Nugent J in *Minister of Safety and Security v Van Duivenboden*<sup>16</sup>

'[12] Negligence, as it is understood in our law, is not inherently unlawful - it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful<sup>17</sup>. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful<sup>18</sup>, but that is not so in the case of a negligent

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<sup>14</sup> *Cape Town Municipality v Paine* 1923 AD 207 at 216 - 17; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) para [12] and *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) ([2003] 4 All SA 330) para [24]

<sup>15</sup> 1966 2 SA 428 (A) 430.

<sup>16</sup> 2002 (6) SA 431 (SCA) at 442.

<sup>17</sup> *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A); *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 568B - C; *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 24D - F; *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA) at 837G; P Q R Boberg *The Law of Delict* vol 1 at 30 - 4.

<sup>18</sup> *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 497B - C.

omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm<sup>19</sup>. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*<sup>20</sup>, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it. While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legally recognised)<sup>21</sup>, nevertheless, in order to avoid conflating these two separate elements of liability, it might often be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable.<sup>22</sup>

[96] In the case *in casu* it is common cause that Mr Kashela acted within cause and scope of his duties as a police officer and it is common cause that the duty of the police is to apprehend criminals but also to protect innocent bystanders.

[97] The question that this court must ask is whether a reasonable police officer in the position of Mr Kashela would have entered a potentially dangerous situation in a crowded area with a firearm that is already cocked and ready to fire? The answer to that must be no. Further to that, whether a reasonable police officer would have foreseen that if he tries to apprehend a suspect that such a loaded weapon can go off? It seems to me to have been an objectively reasonable possibility.

[98] Why do I say that? Mr Kashela came to the scene with a firearm that was already cocked and ready to fire. Mr Kashela moved around in public well knowing that the firearm in his possession is not safe and can go off at the slightest instance. I do not believe Mr Kashela's version that he regarded this firearm as safe although it could go off whether the firearm was on safety mode or not. This type of behaviour is not just unreasonable it borders on gross negligence.

<sup>19</sup> Cases cited in fn 1; Boberg (op cit at 210 - 14); Neethling, Potgieter and Visser *The Law of Delict* 4th ed at 57 - 8; McKerron 'The Duty of Care in South African Law' (1952) 69 SALJ 189 esp at 195 - 6; Joubert (ed) *The Law of South Africa* first reissue vol 8 'Delict' by J R Midgley para 54.

<sup>20</sup> 1966 (2) SA 428 (A) at 430E - F.

<sup>21</sup> *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) fn 5.

<sup>22</sup> See, for example, Botha JA in *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 24 H.

[99] To put the proverbial cherry on top of the icing, on the day in question he walked around with a cocked firearm for no apparent reason. This was even prior to him being aware of the alleged stolen phone or before giving chase to the suspect.

[100] It is evident from the evidence of Mr Yapwire that the slightest blow to the trigger can cause a cocked firearm to fire. That is why it is so dangerous to walk around with a cocked weapon. Mr Kashela then tried to apprehend a suspect with one hand whilst having a cocked firearm in the other amidst a crowd of people. This was a recipe for disaster. No reasonable police man would have acted in the way in which Mr Kashela did. A reasonable police man would have foreseen the possibility that an innocent bystander might be hurt or even be killed.

[101] This then brings me to the second test in the *Coetzee* case and to determine if the said requirement has been met one must weigh the 'gravity of the risk' (a bystander being shot) with the 'utility of his conduct' (apprehending at least one of the suspects).

[102] In *Herschel v Mrupe*<sup>23</sup> Schreiner JA famously said:

'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.'

[103] I am satisfied that Mr Kashela owed a legal duty to protect the innocent bystanders, including the plaintiff, in his capacity as a police official but he had acted in breach of that duty (wrongfully) and had negligently caused the injuries of the

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<sup>23</sup> 1954 (3) SA 464 (A) at 477A – C.

plaintiff and thus I am satisfied that the plaintiff discharged the onus vested in him on a balance of probabilities.

[104] As Mr Kashela acted within the course and scope of his duties the defendant is held to be vicariously liable.

### *Quantum of Damages*

[105] As the action progressed, it became clear that a disastrous event occurred, which led to the plaintiff being shot and struck with a bullet on his right armpit. From the evidence adduced by Doctor Whittaker it is clear that the defendant is suffering from Post-Traumatic Stress Disorder and Major Depression. This, as evidence was led, was due to the fact that the bullet that struck him is still lodged in his body and which has affected his life. This evidence was also corroborated by the defendant's witness, Ms Awuku, which evidence was not disputed. The court is therefore satisfied that sufficient evidence has been adduced for the damages claimed for pain and suffering as well as emotional and psychological pain.

[106] It is trite law that the plaintiff must prove the extent of his loss as well as the amount of damages that should be awarded with a preponderance of probability. It is unfortunate that the Court was not presented with any evidence to support the plaintiff's claim for future medical expenses and operations. As it was pointed out by Doctor Agnew in her testimony that the projectile at the time of her assessment of the plaintiff was not removed, there was no surgical indication to remove the bullet.

[107] Plaintiff therefor failed to call any witness or to produce any documentary evidence in support of its claim. L Steynberg "Fair" Mathematics in Assessing Delictual Damages<sup>24</sup> (2011) (14) 2 PER/PELJ stated in his article at 2 that:

'In assessing or quantifying delictual damages or compensation after a damage-causing event, the object or aim is to give to the injured or prejudiced plaintiff(s) the fullest possible compensation by placing them in the same financial position they were in prior to the damage-causing event.<sup>25</sup> To meet this objective of full compensation, the plaintiff is *inter alia* burdened with the duty to prove the loss he has suffered, including the uncertain future

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<sup>24</sup> (2011) (14) 2 PER/PELJ.

<sup>25</sup> Van der Walt Sommeskadeleer 1, 227; Visser et al Law of Damages 4.

loss which might not yet have transpired at the time he has to lodge his claim.<sup>26</sup> In civil cases the measure of proof is a preponderance or balance of probability.<sup>27</sup> This means that the plaintiff must prove that he has more likely than not suffered certain heads or categories of damage and he must also prove the exact amount of damages that should be awarded to compensate for that loss.<sup>28</sup>

[108] Steynberg op cit at 3 furthermore said the following regarding the task of proving uncertain future loss which might not yet have transpired at the time or after the damaging causing event when the claim is lodged:

'In executing this difficult task the plaintiff could employ the services of a financial expert, such as an actuary, to assist in proving the extent of the loss he will be suffering in future. An actuary specialises in making mathematical calculations based on proven facts and realistic assumptions about the future.'

[109] I must say I am in agreement with counsel for the defendant that the plaintiff had a duty to bring evidence before court and that there is no proof of whatsoever nature before me to substantiate his claim for future medical expenses. Plaintiff had to prove the degree of probability that the uncertain will ensue. He had to lead evidence to enable the Court to assess the amount. He had a duty to present to court the full and best possible evidence within his knowledge and contemplation.

[110] In *Esso Standard SA (Pty) Ltd v Katz* 1981 1 SA 964 (A) 970D-E it was held that:

'In the present case it might be said with some justification that the plaintiff should have sought the assistance of an accountant. He failed to do so, but it does not follow that he should be non-suited. Whether or not plaintiff should be non-suited depends on whether he has adduced all the evidence reasonably available to him at the trial.'

[111] I am therefore of the considered view that plaintiff's claim for future medical expenses and operations stand to be dismissed as no evidence was led at all with regard to the said leg of damages.

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<sup>26</sup> Visser et al Law of Damages 125-128, 487.

<sup>27</sup> Visser et al Law of Damages 488.

<sup>28</sup> Visser et al Law of Damages 488-489.

[112] With regard to past medical treatment and examinations, the court is equally not satisfied that plaintiff has led sufficient evidence to substantiate its claim for N\$ 50 000. Plaintiff testified that when he was discharged at the hospital he had to pay an amount of N\$ 560 for treatment and he handed up the receipt from the hospital as evidence to support the payment. Plaintiff further testified that from the time that he got shot his body was suffering from extreme pain from the bullet and medical procedures and that he has become heavily dependent on painkillers to manage the pain. Because of the constant pain he now survives on taking strong pain killers which he has to purchase at a fee of N\$ 70 per week, which is an added expense ought not to have been incurred had he not been shot by Mr Kashela. However, plaintiff failed to produce any evidence in the form of receipt to corroborate his evidence.

[113] It was held in *Erasmus v Davis* 1969 2 SA 1 (A) para 9E that:

‘The onus rests on plaintiff of proving, not only that he has suffered damage, but also the *quantum* thereof’

[114] Plaintiff in this regard had failed to discharged that onus in proving that he has indeed suffered past medical treatment in and examinations in the amount of N\$ 50 000, the only proof that was brought before court was the receipt of N\$ 560, which the court is of the view, should be granted as damages.

[115] In the result, I order as follows:

Judgment is granted in favor of the Plaintiff in the following terms:

1. Payment in the amount of N\$ 150 560.00, which is calculated as follows:
  - 1.1 Pain and suffering - N\$ 100 000.
  - 1.2 Emotional and psychological pain - N\$ 50 000.
  - 1.3 Past medical treatment and examination - N\$ 560.

2. Interest on the aforesaid amounts calculated at a rate of 20% from date of judgment to date of final payment.
3. Cost of suit.
4. No order is made as to future medical expenses and operations.

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JS Prinsloo  
Judge

#### APPEARANCES

PLAINTIFF: S Zenda  
For Legal Assistance  
Centre

DEFENDANTS: M S Kashindi  
Government Attorneys

