IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, DURBAN

Case No. 9234/94

MUNGISI DLUDLA **PLAINTIFF**

v

MINISTER OF SAFETY AND SECURITY **DEFENDANT**

JUDGMENT

Delivered on: 11 February 2015

MOODLEY J

[1] Arising out an incident which occurred on the 3 June 1994 in the Chesterville Township, Durban during which the plaintiff was shot and arrested by a member of the South African Police Services, and subsequently charged and detained until the charges against him were withdrawn on 21 June 1994, the plaintiff instituted an action against the defendant in November 1994 for damages.

[2] The plaintiff alleges he was shot unlawfully by a policeman acting in the course and scope of his employment with the Defendant, and that his subsequent arrest and detention at the King Edward Vlll Hospital and Cato Manor Police cells at the instance of the same policeman and other employees of the defendant, were also unlawful. He alleges further that his prosecution was wrongful and malicious as the policeman or policemen had charged him without reasonable or probable cause and without reasonable belief that he was guilty of attempted murder. As a consequence being charged, the plaintiff was required to appear in court on 2 days. On the second day the charge was withdrawn.

[3] The plaintiff contends that the defendant is therefore liable to compensate him for damages in the sum of R392 000, constituted as follows:

(a) R342 000 – for future medical expenses, general damages for pain, suffering, disability, loss of enjoyment of life amenities etc.

(b) R20 000 – for unlawful arrest and detention.

(c) R15 000 – for malicious prosecution

(d) R5 000 - for reasonable legal fees

(e) R10 000 - for *contumelia* and *iniuria*.

[4] The defendant admits that the plaintiff was shot and injured by 2 members of the South African Police Services acting the course and scope of their employment with the defendant, and subsequently arrested, detained and charged but contends that the shooting, arrest and detention of the plaintiff was lawful because the plaintiff shot at the policemen with a firearm and they fired back at the plaintiff in self-defence and /or in order to effect a lawful arrest of the plaintiff for attempted murder. The defendant also denies that the prosecution of the plaintiff was wrongful or malicious, and contends that the decision to prosecute lay with the prosecution authorities.

[5] At the commencement of the trial I was advised that the parties had agreed to separate the issues of liability and quantum of damages, and the trial proceeded in respect of liability alone.

Summary of facts:

[6] As a result of the civil unrest and gang violence during 1994 in the Chesterville area and other townships, a special Riot Unit constituted by members of the South African Police Services, was based at the Chesterville police station, which was situated on Mahlathi Road (formerly Wiggens Road). The Riot Unit was a reactionary unit whose members were tasked to investigate unrest in the townships and to take measures to curb and prevent violence.

[7] It was common cause that:

(a) On 3 June 1994, Ian Robin Prentis (Prentis) and Keith Oliver Bennett (Bennett) who were members of Unit 9 of the Riot Unit based at the

Chesterville police station, were on duty and, at all material times, acted in the course and scope of their employment with the defendant.

(b) At about 16h30 on that day, Prentis and Bennett investigated unrest and gunshots fired in the vicinity of Mahlati Road and the Chesterville Town Centre. They ran toward Masuku Road. Both were armed with R5 rifles.

(c) At the same time, the plaintiff was walking on Masuku Road.

(d) Both Prentis and Bennett fired at the Plaintiff but only the shots fired by Prentis hit him.

(e) The plaintiff sustained bullet wounds to his left calf, left mid-thigh and right upper arm; he was arrested by Prentis and kept under guard by Bennett at the scene, and was hospitalised under police guard at the King Edward VIII Hospital from 3 June 1994 to 17 June 1994.

(f) He was subsequently detained at the Cato Manor police cells from 17 June 1994 until 20 June 1994.

(g) The plaintiff was taken to the Regional Court Durban on 20 and 21 June 1994. On 21 June 1994 the charge of attempted murder against him was withdrawn without the plaintiff being formally indicted.

(h) No firearm was recovered at the scene of crime, despite extensive search by the police.

(i) The defendant was unable to locate the docket, any documentation or exhibits relating to this incident or the withdrawal of the charge of attempted murder against the plaintiff.

[8] The plaintiff assumed the duty to begin. However as it was common cause that the police had shot the plaintiff, the onus lay on the defendant to prove on a balance of probabilities that in shooting the plaintiff, the policemen had acted in self-defence and to effect a lawful arrest of the plaintiff because he had shot at them and he had been arrested and detained lawfully. It was also common cause that the police had instigated the charge of attempted murder and the charge was withdrawn without the plaintiff being formally charged in court.

[9] Consequently the issues for determination are whether:

(a) the plaintiff shot at the two policemen;
(b) the policemen shot the plaintiff in self-defence and /or to effect a lawful arrest;
(c) the shooting, arrest and detention of the plaintiff were lawful; and
(d) the police and/or prosecuting authority had acted without reasonable and probable cause and with malice in prosecuting the plaintiff and the prosecution had failed.

The plaintiff's case

[10] The plaintiff testified and called one witness.

[11] He testified that on Friday, 3 October 1994, at about 15h30 he left his home situate at House 131, Mahlati Road, Chesterville and walked to the house of a teacher, Khonto Nxumalo who also lived on Mahlati Road to attend tuition in English. On his way back at approximately 16h40, he took a shorter route home through a park and via Masuku Road. He was on Masuku Road, when he heard gunshots behind him.

[12] Occupants of the second house on Masuku Road enquired from the plaintiff what was happening. He responded that the police who were running across the park were shooting and had resumed walking, when he was shot. He fell and rolled down the embankment at the side of the road. He could not move as his arm was broken, there were three injuries to his left leg and he was bleeding extensively.

[13] One Vela Madlala (Madlala) and later Wandile Thiba and Mathombi Biyela, attempted to help the plaintiff but he refused any help although he was in pain and bleeding.

[14] The police arrived about 45 minutes later. One policeman (whom the plaintiff referred to as 'Ian'; it was common cause that he was Prentis) pointed a firearm at him and searched him, but did not find anything. Prentis took off the plaintiff's pants, shirt and takkies and placed it to the side of him. He then pressed his booted foot down on the plaintiff's left leg and demanded that the plaintiff hand over his firearm. The plaintiff did not respond.

[15] About 10 minutes later, another policeman arrived. (It was not disputed that this policeman was Bennett.) He directed the members of the public to carry the

plaintiff up to the road in a blanket. The plaintiff was cold and people brought blankets to cover him. The blood from his wounds flowed onto the road. The policemen chased away the people who surrounded the plaintiff, and then called an ambulance. Prentis told Bennett that he had run out of bullets, and asked him for more bullets. Bennett gave him about 10 bullets.

[16] The ambulance arrived 25-30 minutes later but the paramedics were not allowed to attend to the plaintiff until a primer residue test was conducted on his hands. Prentis told the plaintiff that the test constituted evidence that he was shot because he had been carrying a firearm and would be utilised in court.

[17] The plaintiff was then placed in an ambulance with Mathombi Biyela and Wandile Thiba, and guarded by Prentis, taken to King Edward VIII Hospital, where he remained under police guard. Prentis told him that he was under guard because he had been in possession of a firearm and had been shot. Prentis was relieved on the morning of 4 June 1994 by a policeman by the name of Geoffrey Zikalala, who interviewed the plaintiff about the shooting and told him that he had been shot by Prentis. Zikalala had died by the time of the trial.

[18] Approximately seventeen days later, on a Friday, the plaintiff was discharged from hospital and detained at the Cato Manor Police Station over the weekend. He was still wearing pyjamas from the hospital and did not know what had happened to his clothes.

[19] The plaintiff taken to the regional court on the Monday but was not called into court because some documents were not available. He spent the night at Westville prison and was taken back to court the next day. He was held in a cell until Zikalala arrived with the documentation. The plaintiff was then informed by the court that the charges against him were withdrawn.

[20] The plaintiff denied that he had ever owned a firearm or fired one or that he had shot at the police and was injured when they fired back at him. He also denied any knowledge about a gang fight on the day he was shot or any attempted intervention by the police.

[21] Although the plaintiff initially impressed as an intelligent and articulate witness, the inconsistencies in his version of events that occurred after he was shot and his evasiveness under cross-examination, and the improbabilities in his evidence

impacted adversely on his credibility. Under cross-examination, he became more and more voluble but less credible, and his previously convincing artlessness became defensive protestations. He refused to answer some pertinent questions in the name of ‘progress’.

[22] Vela Innocent Madlala, who was 35 years old at the date of the trial, testified that he was a lifelong resident at 605 Masuku Road. He knew that the plaintiff lived in Chesterville but was not his friend.

[23] On 3 June 1994 he was sent by his mother to buy bread and sugar at a shop on Road 14, which is a short road that runs alongside the park. He passed a large number of people on Road 14, including the plaintiff and Mathombi who were going towards Masuku Road, which intersects with Road 3 (Ngwenya Road) and Road 14. He did not see any police or members of the gang on his way to the store.

[24] While making his purchases Madlala heard gunshots coming from the direction of the park, which continued for quite a long while. The owner of the shop shut the shop. From the veranda of the shop, Madlala saw the ‘Chesterville gang’ (a gang of ‘criminals’ from Chesterville) run down Road 14 with about five policemen running behind them. The gang and the police were shooting as they ran towards and down Ngwenya Road.

[25] The plaintiff was not near the gang or the police and Madlala did not see whether the gang or the police shot the plaintiff, but he saw the plaintiff falling and ran to assist him. When Madlala reached him, the plaintiff was lying next to a fence, screaming and crying. He refused to allow Madlala to assist him. Madlala’s mother and other people including Mathombi, Lindiwe, Nomvula and Sthombe also tried to help the plaintiff.

[26] When the police arrived some time later, they went straight to the plaintiff, and moved everybody, including Madlala, away from him. However Madlala observed one policeman take off the plaintiff’s clothes and put a tin on his hands while he was still lying in the yard. The plaintiff was then carried up the hill in a blanket by the police and placed on the grass near the road. Members of the public were not allowed to touch the plaintiff. Madlala was at that point chased away by his parents. He therefore only observed what happened at the bottom of the embankment, and not at the roadside, after the plaintiff was carried up to the road.

[27] Madlala described the plaintiff as a “charmer” or as a “girl magnet” in the area. He disagreed with the plaintiff’s version that there was no one on the road but him; he was confident that he saw people on Masuku Road and the plaintiff walking with some girls, even if the plaintiff had not seen him.

[28] Madlala testified quite confidently and had no hesitation in contradicting the plaintiff’s version, until he became aware that the discrepancies were between his version and that of the plaintiff. He then began to backtrack, saying that the incident had happened a long time ago. Madlala failed to corroborate material aspects of the plaintiff’s evidence, as will become apparent in the evaluation of the evidence.

Defendant’s case

[29] The two policemen who shot at the plaintiff testified.

[30] Robert Ian Prentis testified that on 3 June 1994, he was on duty as a gate guard at the Chesterville police station. He was sitting in his vehicle at the gate, when he heard gunshots which went on for 2 to 3 minutes about 400-500 metres away, in the direction of Nala or Molefi Road.

[31] Prentis suspected that the police may be under attack because the police were frequently ambushed, the police station had been attacked previously and two policemen had been shot near the station a few months earlier. He therefore took his R5 rifle out of the vehicle. However he realised that there was a gunfight between two rival gangs. He saw one group of young men running towards the shop near Chesterville Secondary School. He described the area as a ‘Community Centre’ with shops, a taxi rank etc.

[32] The police station was a vantage point because it was above road level. He watched the gang of 15-20 men from about 150-200 meters away and lost sight of them intermittently when they were hidden by bushes, buildings and trees as they ran from Nala/Molefe Roads towards Ngwenya Road. He could not identify the gang and was not sure if they were shooting or being shot at. Four or five men were carrying rifles, handguns and sticks.

[33] Although he realised that the police were not under attack, Prentis decided to intercept the gang to prevent them from shooting or killing anyone and to investigate

what was happening. He ran left from his post towards the school on Mahlati Road and then across the park. The gang ran onto Masuku Road while he was still in the park about 75-100 metres away. Bennett joined Prentis, following to his right. He did not speak to Bennett but heard him running behind.

[34] There were a lot of people running at this stage as people from the shops and those on the road also started running. There were women and children among the people on the road as it was between 16h40 and 17h00 which was generally a busy time. Gunfire from over the hill could still be heard. When the gang reached the point where the cars on Exhibit B2 are parked, Prentis was still about 10 metres away from the road and there were members of the public on the road between him and the gang.

[35] While the others ran on, Prentis saw one of the men stop near a path on Masuku Road, turn and face them, and then shoot in their direction. Prentis immediately fired four to five rounds of ammunition at the plaintiff and hit him. Bennett also fired. Prentis did not know who he was shooting at but presumed that they both fired at the suspect as he was the only threat. The plaintiff fell into the grass and Prentis lost sight of him and his firearm.

[36] Prentis did not move immediately because he wanted to secure the area. He walked onto Masuku Road and towards where the plaintiff had fallen. Prentis had to search for him because he was not where he had fallen but 20-30 metres away, lying at the bottom of the embankment. He was alone. Prentis then went down to him while Bennett stayed on the road.

[37] The plaintiff was conscious and lying on his back. He had sustained injuries to his arm and his upper left leg and was bleeding profusely. Prentis pointed his firearm at him and asked him for his firearm, which he denied he had. Prentis searched the vicinity for a firearm but did not find one. He told Bennett that he could not find the firearm. He then instructed the plaintiff to walk up to the road, which he did. He could not remember what the plaintiff was wearing. After they reached the road a crowd gathered, but he moved them away. He was alone at that point because Bennett had gone to radio for back up.

[38] The Casspir and ambulance arrived about 30-35 minutes later and the paramedics attended to the plaintiff before he was taken away in the ambulance. Prentis did not accompany the plaintiff to the hospital or stand guard over him,

although a police guard would usually have accompanied a suspect. He did not see him again or know what happened to him once he was taken away.

[39] Prentis found about 10-15 spent 9mm cartridges on the road near where the plaintiff was shot, which he marked with a stone but did not remove. He reported to the commander on the scene. He was questioned about the ammunition used, how much was left and the circumstances under which he fired the shots. He went off duty after making the report. He later made a statement. A shooting report was also compiled, the objective of which was to determine if the shooting was justified. If it was not, Prentis would have been charged, which he was not. The Plaintiff however had laid a charge of attempted murder against Prentis but he had not been prosecuted on the charge.

[40] Prentis confirmed that he had arrested and detained the suspect at the scene. He admitted that he had deliberately shot the plaintiff but denied that his actions were unlawful because the plaintiff shot at them and he intended to eliminate the threat constituted by the plaintiff to himself, his colleague and members of the public on the road. Although he was not under instructions to investigate the gunfire or any disturbance in close proximity to the police station, he had done so because he was there to protect the people and secure the area and the shots fired by the plaintiff may have struck people on the road.

[41] Prentis confirmed that he had pointed a firearm at the plaintiff while he lay on the ground because the plaintiff may still have been armed. He denied that he threatened the plaintiff or that he had pressed on him with his boot or stripped off his clothing or that community members assisted the plaintiff onto a blanket. He was not aware that a primer residue test was conducted on the suspect. He denied that he had asked Bennett for ammunition, as he had only fired four or five rounds. He did not have authority to order that a primer residue test be conducted or to give orders to the paramedics. His responsibilities were to search for the firearm and keep the community away.

[42] Prentis was a confident witness and related the details of the incident without faltering or contradiction, even under strenuous cross-examination. He persisted that the plaintiff had carried a firearm, which he described without hesitation, and shot at them before they fired back at him.

[43] Theo Oliver Bennett, on the other hand, admitted that his testimony was constrained by his poor recollection and impressed on the court that his estimates of distance were just that. He was in fact inconsistent with his estimates of distance and numbers. He referred to 'the suspect' in his testimony but it was common cause that he referred to the plaintiff.

[44] He testified that between 16h30–17h30 on 3 June 1994, while inside the police station, he heard shooting from the buildings to the right of the police station. The shots seemed to emanate from small firearms and continued for about 5 minutes. He grabbed his firearm, a R5 rifle, and with Prentis and a black policeman whose name he could not remember, ran out of the gate of the police station. Although they left the station together they did not discuss strategy.

[45] They ran around the buildings and along the path in the park. There were people running down from the top of the road alongside the park. He did not notice whether any of them carried firearms. The shooting continued as they approached Masuku Road, on which there were a number of people, including children. From their elevated position, Bennett noticed 2 young men walking side by side in the middle of Masuku Road about 60–80 meters ahead of them. (He later stated that they were approximately 50–60 meters away.) They were walking away from the direction of the gunfire down Masuku Road, but looking around. He could not remember their clothing. One of the men who was carrying an object which resembled a firearm, turned and fired at them.

[46] Both he and Prentis retaliated in self-defence. Prentis shot first but they subsequently shot together and then both stopped as soon as the men turned and started running. Bennett fired 3 or 4 shots. The black policeman who remained with them throughout the incident did not shoot. The suspect was facing them when he fired and they shot at him while he was still standing. The plaintiff ran about 80-100 metres from where he was shot before he fell into a ditch on the left of Masuku Road. It took Prentiss and Bennett about 3 minutes to work their way to where the plaintiff disappeared. People were gathering around. Prentis went to the suspect and asked for his firearm but he did not produce it. Bennett did not speak to the suspect, but remained on guard in his immediate vicinity. He was able to see Prentis most of the time although Prentis was in the ditch and would have seen him removing the plaintiff's clothing had Prentis done so. He added that it would have been so unusual that he would have remembered. The situation was also very volatile and they would

not have wanted to antagonise anyone. He did not recall anyone going to the plaintiff while Prentis was with him.

[47] The ambulance arrived about 45 minutes later and the backup and police, about an hour later. Bennett did not know if the plaintiff was searched or whether Prentiss pressed down on his injured leg and could not recall how long he lay in the ditch and on the road before the ambulance arrived. He did not know how the plaintiff moved up to the road or whether the paramedics were prevented from taking him into the ambulance. But he denied the allegation that Prentis ran out of ammunition and asked him for bullets which he handed to Prentis, declaring that Prentis was not a person who would have run out of ammunition.

[48] Bennett did not guard or see the plaintiff after the incident. He was also certain that neither he nor Prentis went to the hospital with the plaintiff as they had remained at the scene until it was quite dark searching for the firearm. They did not find the firearm but they found several empty cartridges (5 or 10) which may have been 9mm, on the road from where the plaintiff had shot at them. A primer residue test was done on Bennett after the ambulance arrived, but he did not observe tests on anyone else. Bennett made a statement on the same evening. He did not follow up on the matter and left the service in September 2009.

[49] Under cross-examination Bennett confirmed that they had not needed authorisation to go on the operation as they were all trained to react to the shooting. Only the radio operator and the guard would not usually leave the station, but even the guard could move to investigate an occurrence. Bennett confirmed that Prentis would have been at his post but could not recall where the third policeman came from. Bennett's intention was not to shoot or to get involved in the shooting but to investigate what was happening, especially because the shooting had gone on for an extended period.

[50] Bennett maintained that he and Prentis had acted lawfully. He saw the object in the plaintiff's hand and the plaintiff then fired. He then fired in self-defence, and also to protect the people on the road who were under threat from stray bullets shot by the plaintiff. They stopped the suspect shooting by shooting him. Bennett described himself as cautious by nature and had therefore taken sufficient caution before he fired at the plaintiff. He emphasised that everything happened very quickly

but was adamant that the plaintiff had a firearm. Therefore even if Prentis had not fired first, he would have shot at the plaintiff.

Legal Principles

Unlawful arrest

[51] **Section 39** of the **Criminal Procedure Act No 51 of 1977** (the Act) states**:**

> **‘ Manner and effect of arrest**
>
> (1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.
>
> (2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.
>
> (3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.’

[52] The requirement that the arrested person be informed of the reason for his arrest while the arrest is being executed or as soon thereafter as is practically possible, is strictly applied because an arrest drastically curtails a fundamental right of the arrested person. In the context of subsection 2 'immediately' means 'as soon as practically possible', not 'instantaneously'.

[53] In **Minister of Law and Order v Kader**[1] it was held that, in applying the principle that the nature and extent of information the arrestor is required to impart to the arrested person depends on the circumstances of each case, particularly the arrested person's knowledge concerning the cause of his arrest. The notification of the reason for the arrest is in principle a prerequisite for lawful arrest but does not affect the legality of the arrest itself, but merely the legality of the subsequent detention. The detention of a person lawfully arrested but not brought to court within 48 hours in terms of Section 50 will not continue to be lawful because of Section 39(3), which provides for lawful detention during the period between lawful arrest and

[1]1991 (1) SA 41(A)

the first court appearance but does not necessarily legalise a detainee's detention until charges against him are eventually withdrawn.[2]

[54] **Section 40(1)(a)** of the Act provides that a peace officer may without a warrant arrest any person who commits or attempts to commit an offence in his presence. The jurisdictional facts necessary for an arrest under **Section 40(1)(a)** are:

(a) the arrestor must be a peace officer;
(b) an offence must have been committed or there must have been an attempt to commit an offence; and
(c) the offence or attempted offence must be committed in his or her presence.[3]

[55] An arrest is a drastic interference with the rights of the individual to personal liberty and dignity and the lawfulness of his or her arrest must therefore be objectively justifiable.[4]

[56] It is trite that the onus rests on a defendant to justify an arrest. In **Minister of Law and Order & Others v Hurley & Another, Rabie CJ** explained :

> 'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the *onus* of proving that his action was justified in law.' [5]

[57] In **Minister of Safety and Security & Another v Swart**[6] the Supreme Court of Appeal held that the onus to prove that an arrest was lawful rests on the arresting officer.

[58] In **Minister of Safety & Security v Tyulu** the Supreme Court of Appeal confirmed that the appellant (defendant before the court a quo) bore the onus of establishing the lawfulness of the respondent's arrest on a balance of probabilities.

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[2]cf Minister of Justice and Constitutional Development v Zealand 2007 (2) SACR 401 (SCA) at [8]–[10]
[3]Du Toit et al Commentary on the Criminal Procedure Act 5-9

[4]Minister of Correctional Services v Tobani (2003 (5) SA 126 (E)); [2001] 1 All SA 370 at 371*f* : So fundamental is the right to personal liberty that the lawfulness or otherwise of a person's detention must be objectively justifiable, regardless . . . even of whether or not he was aware of the wrongful nature of the detention.

[5]1986 (3) SA 568 (A) at 589 D-E
[6]2012 (2) SACR 226 (SCA) at [19]

‘ It is correct, as the Full Bench found, that the appellant bore the onus of establishing the lawfulness of the respondent's arrest on a balance of probabilities (*Minister of Law & Order & another v Dempsey* 1988 (3) SA 19 (A) at 38B–C and *Zealand v Minister of Justice & Constitutional Development* 2008 (2) SACR 1 (CC) [also reported at [2008] JOL 21448 (CC)–Ed] at paragraphs [24]–[25]). [7]

[59] The lawfulness of an arrest is closely connected to the facts of each situation.[8]

Self-Defence

[60] The defendant also has the onus in respect of the reliance on self-defence as the reason for the shooting of the plaintiff. In **Mabaso v Felix,[9]** the court stated **:**

‘We also think that, if the excuse or justification pleaded is self-defence, the onus is generally on the defendant too to plead and prove that the force used by him in defending himself was in the circumstances reasonable and commensurate with the plaintiff's alleged aggression, again unless the pleadings place the onus on the plaintiff.’[10]

and further

‘the onus of proving that the force used in self-defence was reasonable and legitimate would also be on the defendant.’[11]

[61] Similarly in **Minister of Law and Order v Milne, Nugent J** held that :

‘The approach which is taken by our law was set out in *R v Molife 1940 AD 202 at 204 and R v Attwood 1946 AD 331 at 340 (see too R v Patel 1959 (3) SA 121 (A) at 123A)*. In Attwood's case Watermeyer CJ said that homicide in self-defence is justified if the person concerned 'had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury, that the means he used were not excessive in relation to the danger, and that the means he used were the only or least dangerous means whereby he could have avoided the danger'.**[12]**

[62] In **Salmond and Heuston on Torts,** the following is said:

'It is lawful for any person to use a reasonable degree of force for the protection of himself or any other person against any unlawful use of force. . . . Force is not reasonable if it is either (i) unnecessary - ie greater than is requisite for the purpose - or (ii) disproportionate to the evil to be prevented.'

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[7][2009] JOL 23662 (SCA): 21
[8]Minister of Safety and Security v Van Niekerk 2008 (1) SACR 56 (CC) at [20]
[9] 1981(3)SA865(A)
[10]page 874 B-C
[11]Page 875 H
[12]1998 (1) SA 289 (W) at 292J – 293C

> For the defence to succeed then, the force which was used must not only be necessary, but must also not be excessive. These are separate and distinct requirements. It ought not to be thought that, once there is some risk of death or injury, resort may necessarily be had to lethal force merely because that is the only means available to repel the risk.' [13]

Evaluation of Evidence

[63] The court was faced with two mutually destructive versions, which lay to be resolved in accordance with the technique set out in **Stellenbosch Farmers Winery Group Ltd & Another v Martell et Cie & Others**

> 'The technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions before it may be summarised as follows. To come to a conclusion on the disputed issues the 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 of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to *(b)*, a witness' reliability will depend, apart from the factors mentioned under *(a)* (ii), (iv) and (v), on (i) the opportunities he had to experience and observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it.' [14]

[64] In **McAlister v Wavelengths and Mazeka**[15] **Swain J** held that the versions advanced must not only be probable but must also accord with common sense and logic.

Evaluation

[65] In evaluating the testimony of the witnesses, I have remained mindful of the environment in which the incident occurred: that this was at the dawn of the constitutional era in South Africa, when many pre-constitutional practices still persisted, and the prevailing conduct of the armed forces and police did not always

[13] 19th ed at 142
[14] 2003 (1) SA11 SCA at Paragraph [5] at 14I - 15E
[15] Case No 3163/2010 PMB

accord with the demands of the Bill of Rights and Constitutional imperatives of respect for human rights and dignity.

[66] I have also been mindful that the duration of the period intervening between the occurrence of the shooting and the trial may have impaired the recollection of the witnesses. Further the configuration of the intersection of Road 14, Ngwenya Road and Masuku Road as depicted in Exhibit B3 was not the same as on the date of the incident.

The mutually contradictory versions

[67] The plaintiff was confident that he had a clear recollection of the events of 3 June 1994 despite the lapse of time. He alleged that he was in Masuku Road when he was shot because he was on his way home from attending extra English lessons. But he furnished no details of the teacher Nxumalo except his name. He did not know the street number of Nxumalo's house, although he went there regularly, nor the school or the night school at which Nxumalo taught, nor the other pupils whom Nxumalo tutored, although he testified that he heard about Nxumalo because he used to give extra lessons. The plaintiff had not seen Nxumalo from the time he left school.

[68] His evidence that he did not take texts or writing material for his tuition with Nxumalo lacked credibility as it did not sustain his allegation that he had tuition on the same day when he had English lessons at school so that Nxumalo could help him with his school work for that day. In particular he was unable to explain satisfactorily how Nxumalo helped him with his homework on Fridays if he did not carry any homework with him. Even on 3 June 1994 which was a Friday, he did not take the homework with him. According to the plaintiff, Nxumalo did not charge for the lessons – but he provided stationary and other material free of charge to his students. In my view the plaintiff's implausible testimony about his lessons with Nxumalo was intended to counter the testimony of Prentis and Bennett that he was carrying a firearm which he fired at them.

[69] The plaintiff's time frame relating to his lesson prior to the shooting was inconsistent. He initially testified that he arrived at Nxumalo's house after 15h30 and left at approximately 16h40 (because he saw the bus which left at 16h40). Under cross-examination he testified that he left home about 15h40 and walked 15 minutes to Nxumalo's house, spent an hour with Nxumalo and then left for home. However

when it was put to him that if his lesson had been an hour, he would have only left at 16h55, he responded that when the bus arrived about 16h40 he knew that he had twenty minutes and it was almost time to go home. It was apparent that the plaintiff was tailoring his testimony.

[70] The plaintiff's reason for being on Masuku Road when he was shot also lacks credibility. He described the route that took him along Masuku Road as 'a shortcut' which took him straight to his home. But according to the plaintiff this 'shortcut' also took him the same 15 minutes as his walk to Nxumalo. When it was correctly put to the plaintiff that the route he followed home was much longer,[16] he responded that it was a safer route as it was away from the cars, and as he was tall it only took him 15 minutes. He also reluctantly admitted that some sections of the route were uphill. He evaded a direct answer as to why he had originally alleged that he used a shorter route home, merely stating that he lived in this area all his life and did not want to continue arguing the issue. But he added that he used the alternative route when his mother sent him on errands to a house situated on that route. He used the straight route to Nxumalo because his mother watched him and he wanted her to see that he was going for his lessons. But she had no reason to keep an eye on him as he was not forced to attend the tuition because according to the plaintiff, he voluntarily attended the lessons to improve his proficiency in English with his parents' approval.

[71] In my view as Nxumalo's house was allegedly near the police station and not too far from Masuku Road, the lessons were an attempt by the plaintiff to furnish a legitimate reason for his presence in Masuku Road at the time of the shooting. I am fortified in my view by the response of the plaintiff when he was unable to furnish a reasonable explanation: he stated that he had no comment and wanted to move forward. The plaintiff's explanation was clearly contrived as he contradicted himself and his testimony became increasingly implausible under cross-examination.

[72] A further anomaly in the plaintiff's testimony was that he did not mention any commotion or the gunfire described by Madlala, Prentis and Bennett, which led to the intervention by the policemen and their presence in Masuku Road. Prentis and Bennett testified that they attempted to reach the people running alongside the park by cutting across the park to the intersection and that the plaintiff was among these

[16] Exhibit A1

people when he fired at them. The road cleared rapidly when the shots were exchanged.

[73] The plaintiff denied any knowledge about a gang fight on the day he was shot or that the policemen had tried to intercept the gang. He stated that he was walking alone on the road when he was stopped by the occupants of the house when gunshots were heard. The shots were fired by the policemen as they ran across the park but he did not know if they were shooting at him or at other people who had disappeared. But he saw no one else on the road either in front of him or when he faced the police and did not see what the police were shooting at. The plaintiff deliberately downplayed the presence of others on Masuku Road. He initially testified that 'People were running around and making a noise' – but when asked 'what people?' he responded 'it was a Friday'. Under cross-examination, the plaintiff denied that he had said that Masuku Road was busy; he had said that Mahlathi Road had many pedestrians. He had however stated that there were people running on Masuku Road, and his denial was clearly intended to sustain his version that he was alone on Masuku Road when he was shot by the police.

[74] Madlala however contradicted the plaintiff's version that he was alone on Masuku Road when he was shot. He testified that the plaintiff was walking with some girls and that the plaintiff was usually accompanied by girls. He persisted that on his way to the shop, he saw the plaintiff with Mathombi – one of the people who, according to the plaintiff, tried to assist him after he was shot.

[75] Although Madlala started back tracking when the contradictions between his evidence and that of the plaintiff was put to him, he did not retract his evidence that the gunfire commenced prior to the police running across the park and that the plaintiff was among the group of people who ran down Road 14 while the shots were fired. He also admitted that shots were fired by the Chesterville gang and the police. He therefore corroborated the version of the policemen that they ran through the park to intercept the crowd that was running down Road 14 and investigate the source of the gunshots. He testified that the shop on Road 14 in which he was making purchases was closed because of the gunfire, which preceded the gang and police running down Road 14. He also corroborated their evidence that the plaintiff was on Masuku Road among the people who ran down Road 14, which is a short road that runs alongside the park and intersects with Masuku Road and Ngwenya Road. The plaintiff alleged that he had walked across the park into Masuku Road and not from

Road 14, but Madlala explained that one had to go via Road 14 to get to the park or into Masuku Road.

[76] It is apparent, in my view, that by insisting that he was alone and that there was no one else on Masuku Road, and alleging that he did not walk along Road 14, the plaintiff attempted to distance himself from the people running down Road 14, which included members of the gang who were armed.

[77] Prentis and Bennett testified that they only fired at the plaintiff when he fired at them. They both stated that he stopped, faced them and shot at them. Prentis testified that he saw the plaintiff clearly as they were still in an elevated position and there were no shadow over him. He was holding what appeared to be a black semi-automatic hand gun with both hands in front of him although Prentiss could not describe the exact position of his hands or his stance. Prentis heard the shots and saw the muzzle fire when the plaintiff fired at them. Bennett corroborated Prentis's evidence that they observed from an elevated position, the plaintiff turn and fire at them. He also confirmed that there were many people on the road which was narrow – about 5-6 metres wide, but he had a clear view of the suspect, who was carrying 'an object which resembled a firearm' with which he shot at them. Under cross-examination he described the manner in which the plaintiff carried the firearm: to his side, by the handle with the barrel dangling'. He stated that it was 'a handgun, but not a pistol or revolver'.

[78] Prentis and Bennett also did not agree as to the exact spot where the plaintiff was standing when he fired at them, but both described how the plaintiff fell down when he was shot but he got up and ran before he disappeared from sight when he went off the road and that they found him lying at the bottom of an embankment a distance away from where he was shot (depicted in Exhibit B5). Madlala testified that the plaintiff fell near some steps on Masuku Road, which were not visible in any of the photographs in Exhibit B. Madlala identified the pathway and steps depicted in exhibit B5 as the area in front of his home; but denied that the plaintiff had fallen there. He could not point out where he found the plaintiff on the available photographs. His evidence as to where he found the plaintiff was inconsistent and he wavered under cross-examination. But according to the plaintiff he had walked about 20 metres on Masuku Road and then taken a few steps further; therefore the point at which he rolled down was visible on Exhibit B2. Consequently there was no certainty as to the exact spot where the plaintiff was when he was shot. The defendant's

version was that the plaintiff was approximately 50 meters away from the policemen when he was shot. But according to the plaintiff's version, if the police were still 10 meters away in the park and he was 20 meters into Masuku Road – he was shot at 30 meters. At that distance no doubt the police would have been able to observe him fairly closely.

[79] Although no firearm was recovered at the scene despite extensive search and despite the discrepancy in the description of the firearm by Prentis nor Bennett, contrary to the argument advanced by Mr Pillemer that these shortcomings are fatal to the defendant's version that the plaintiff was armed, I am of the view that their version is to be preferred over, and is more credible than, that of the plaintiff.

[80] Firstly given the mobility of the scene and the distance between where the plaintiff was shot and where he was found, the fact that he was fleeing and the number of people in the area at the time of the shooting, the failure to recover the firearm fired by the plaintiff is, in my view, not fatal to their version. These factors would also have contributed to what Prentis and Bennett were able to observe while running towards Masuku Road.

[81] Secondly, the probabilities do not favour the plaintiff's version that he was shot without reason as he walked alone on Masuku Road. Prentis and Bennett testified that they were investigating the shooting and the unrest but did not fire any shots while running towards Masuku Road. There would have been no reason for either of them to fire at an innocent civilian walking alone when their focus was on the running group, unless there was some catalyst or reason to draw their attention to him and the cause them to fire at him. It is apparent from their evidence that their attention was specifically drawn to the plaintiff, albeit individually. They did not shout out or warn the other, but they both reacted by firing at the same person. Prentis only observed the plaintiff shoot and the muzzle fire. Bennett observed him walking alongside another male and looking in their direction before firing. In my view the only reasonable conclusion is that they focussed on the plaintiff when he turned and fired at them and they retaliated by shooting at him.

Further although no cartridge cases were produced as exhibits during the trial, both Prentis and Bennett testified that although the firearm carried by the plaintiff was not found, cartridge cases were recovered. Prentis was specific that he recovered 10 -15 9mm cartridges near where the plaintiff was shot, while Bennett thought that the

cartridges were 9mm. As the policemen were carrying R5 rifles, the cartridges must have been ejected from a firearm in proximity to the spot of recovery.

[82] The conclusion that the plaintiff's version is not the truth is further sustained by his inexplicable actions when he heard the gunshots behind him. He alleged that he moved to the side of the road near the grass when the bullets 'popped' on the road in close proximity to him, but when the people on Masuku Road spoke to him, he stopped, turned around and pointed out the two policemen who were running across the park towards them as the source of the gunshots. He then turned to carry on walking on the tarred road.

[83] As gunshots were also not uncommon at that time because the unrest in the Chesterville community was violent and widespread, the plaintiff's allegation that people made enquiries about the shooting from a passing pedestrian lacks credibility. It is further improbable that in a dangerous situation when bullets are striking in close proximity, a person will not take instinctively take cover because he is responding to questions, as alleged by the plaintiff. The plaintiff also claimed that he did not take cover because he was 'not trained to be a soldier' and that if he ran he would have seemed guilty, which is why he moved to the side. It was common cause that the crowd of people comprised members of the public, including women and children, who were running scared. The question which arises is, why would the Plaintiff have been singled out as a target, if he had merely joined them in fleeing?

[84] The nature of the plaintiff's injuries fails to sustain his version that when he was shot he was facing down Masuku Road in the direction he was headed, with his back towards the police. According to the plaintiff he was shot in 4 places: right rear upper arm, right side of left groin, left thigh through to the back, left calf through the right and exit on the left. However the injury to the groin is not described in the pleadings and was mentioned for the first time by the plaintiff during cross examination. The plaintiff insisted that this injury kept him in hospital for a long time but could not explain how the orthopaedic surgeon who examined him in October 1994 (see Exhibit A3) did not note the groin injury. The medical report records that the patient stated that he sustained 3 injuries: left calf, left mid-thigh and right arm. However the plaintiff insisted that he told the doctor that he sustained 4 gunshot wounds. The summons in this action specifies 3 injuries. The plaintiff proffered the following explanations for the 'omission of his fourth injury': his first file was left in the

police station; the examining doctor and attorney forgot his instructions; the doctor did not notice the injury to his groin, none of which was convincing.

[85] The plaintiff confirmed that he was shot in the arm from the back; his groin and thigh, from the front and his left calf, from the left to the right. According to the plaintiff he was facing down Masuku Road in the direction he was heading; the police were behind him; but he may have faced the police after he was shot, because the shot in the arm made him fall to his knees and then turned him left. However it is unlikely that he could have been shot in his left leg after he fell down as it was not disputed that the police were at a distance of approximately 50 metres when he was shot. Further, although the plaintiff admitted that 2 shots hit him from the front he vehemently denied that he faced the police at any time. However he subsequently admitted that he saw the police firing the shots. But immediately thereafter despite his earlier claim of clear recollection, he suddenly alleged that he could not remember everything clearly. It was apparent that he realised too late the implication of his admission that he saw the police firing at him viz that they could not have shot him while he was walking away.

[86] In response to the proposition that the police would not have fired at him if he was not facing them he responded that the police had automatic firearms which would fire at anything. This led to his being confronted with his knowledge of firearms, which he had denied in his evidence in chief. In response, he first stated that he could distinguish firearms placed in front of him, then that he did not have 'much knowledge of firearms' and finally that he had seen the firearms which the police carried at the police station. These responses did not however explain how the plaintiff identified an automatic firearm if he was totally ignorant of firearms as he claimed to be. The plaintiff also described the length of the bullets for the R5 rife as 5cm, which was confirmed by Bennett. He alleged that he noted the number and length of the bullets while lying on the ground after he was shot. Yet he also claimed to be in such great pain that he rejected offers of help, salt and water from members of the community. The plaintiff conceded further, that irrespective of the kind of firearm used by the police, his injuries were related to the direction he was facing when shot.

[87] Although the plaintiff complained that no one helped him after he was shot, when Madlala attempted to help the plaintiff, the plaintiff rejected his help because Madlala was too young and puny at 15 years of age. This explanation or the failure to

explain why Wandile Thiba and Mathombi were also unable to help him but left him lying where he had fallen for 45 minutes leave more questions than provide answers, as they could have attracted the attention of the police in order to get assistance for him. Madlala mentioned more than three people who went to where the plaintiff lay.

[88] Prentis and Bennett on the other hand stated that the plaintiff was alone when they found him, although members of the community gathered later when the plaintiff was lying on the side of the road. They described how they approached where he had fallen with caution because he had been armed but denied that they had reached him 45 minutes later. Prentis estimated that it took four to five minutes from the time he shot the plaintiff until he reached him, and Bennett thought it took about three minutes. It is in my view, highly improbable that, despite their cautious approach, they would have left a suspect lying for so long without attempting to arrest him or prevent him from fleeing, especially if he was armed and had shot at them.

[89] The plaintiff alleged that Prentis pressed down on his injured leg with his boot and demanded his firearm, but he did not respond. This begs the question as to why the plaintiff did not immediately deny that he had a firearm. Prentiss however testified that the plaintiff did deny that he had a firearm; Bennett confirmed that the plaintiff denied that he had a firearm to Prentis. According to the plaintiff, Prentiss told Madlala to move aside and then searched him and removed his clothes, while Bennett was keeping the bystanders away. Bennett then told members of the community to put the plaintiff and his clothes on the blanket and take him up to the road.

[90] Madlala testified that the policemen went straight to the plaintiff, and moved everybody away. But he was still able to observe that one policeman took off the plaintiff's clothes. He contradicted the plaintiff by stating that not all the plaintiff's clothes were stripped off; his pants and shoes were on him but his belt was unbuckled and the pants were undone. He also contradicted the plaintiff's version when he stated that the plaintiff was carried in the blanket held on both sides by policemen up the embankment and placed on the grass near the road.

[91] However, according to Prentis and Bennett, Bennett remained on the road, keeping a lookout for other attackers while Prentis went down to the plaintiff – there was no one else with him. Prentis was also very confident that the plaintiff walked up

the embankment himself and was not carried. Both policemen denied that Prentis removed the plaintiff's clothes. In my view it is also improbable that in a volatile situation when the tempers were running high, the two policemen would have deliberately stripped and assaulted the plaintiff in the presence of a number of bystanders. But it is Madlala's version that persuades me to conclude that the plaintiff was not telling the truth about being stripped at the scene. Further, the plaintiff testified that before he left the hospital he was taken to fetch clothes. But he persisted that he went to court in pyjamas because his clothes could not be found.

[92] The plaintiff also alleged that as he was lying on the ground, he heard Prentis say that he had run out of bullets and ask Bennett for more bullets. Bennett gave him about 10 more bullets. Both policemen denied this allegation. Bennett was of the view that Prentis was always so well armed that he would not have run out of bullets, especially as he had only fired four or five shots, which also accords with their testimony that they did not fire any shots prior to the plaintiff shooting at them.

[93] The plaintiff also offered several contradictory versions about what happened after he was shot. In his evidence in chief he stated that he was shot on the side of the road and as he lay on the grass, the blood from his wounds flowed onto the road. He alleged that he was cold and people brought blankets to cover him as he lay on the side of the road, but under cross-examination he stated that when he was taken up to the road in the blanket, and the blanket prevented the blood from running onto the road.

[94] The plaintiff alleged that the paramedics were not allowed to assist him until a primer residue test was conducted and that Prentis told him that the sellotape used in the test was evidence that would be utilised in court as he had been shot for carrying a firearm. Prentis on the other hand testified that he was not aware that a primer residue test had been conducted and that no test had been performed on him. In any event, Prentis admitted to shooting the plaintiff. But Madlala contradicted the plaintiff, as he stated that the test was done while the plaintiff was still lying in the yard below the road. He had not observed anything that took place at the roadside as his parents had chased him away. Bennett however testified that a primer residue test had been conducted on him but did not know who else had been tested.

[95] Although no further evidence about the primer residue test or the results were produced at the trial, the probabilities are that a primer residue test was conducted

on the plaintiff. However Madlala's version that the test was done while the plaintiff was lying in the yard, together with his evidence that the plaintiff was not stripped completely by the police as alleged by the plaintiff and the other contradictions already identified, favour the conclusion that Madlala did not attend on the plaintiff after he was shot, although he may have been in the vicinity of Masuku Road during the incident.

[96] Bennett testified that when he left the police station a black policeman, whose name was unknown to him, ran with him and that this policeman was present throughout the incident, but did not shoot. However when he described the events after the shooting of the plaintiff, he did not mention the third policeman. Prentis on the other hand, did not mention any other policeman but Bennett. However as he ran ahead of Bennett, he may not have seen the other policeman. The plaintiff too only mentioned Prentis and Bennett, and not a third policemen. Nevertheless, in my view, nothing turns on this discrepancy.

[97] Having considered the conspectus of evidence, I am satisfied that the plaintiff's evidence lies to be rejected as false and fraught with improbabilities, while the testimony of the former policemen was credible and consistent with the probabilities of the prevailing circumstances under which the plaintiff was shot. The defendant has therefore proved on a balance of probabilities that the plaintiff did fire at the police. Given the proximity of the plaintiff to both the police and members of the public on the road, I am also satisfied that they returned fire in self-defence and to avoid the possibility of anyone else being injured. I am unable to find that their conduct was unreasonable or unjustified in the circumstances as there were no other means to stop the plaintiff shooting at them.

[98] In the premises, the requisite jurisdictional facts necessary for an arrest under **Section 40(1)(a)** have been proved and I find that the arrest of the plaintiff on a charge of attempted murder was lawful.

Unlawful Detention

[99] As the arrest of the plaintiff was lawful, there is nothing to disturb the conclusion that his subsequent detention was also lawful.

[100] The plaintiff testified that when he was taken by ambulance to King Edward VIII Hospital he was accompanied by Prentis, Mathombi Biyela and Wandile Thiba. The police were at the hospital all the time. Prentis told him that the police were there because he had a firearm and had been shot. However Prentis denied that he accompanied the plaintiff in the ambulance or guarded him at the hospital. He had remained at the scene to report on the incident to his superior and search for the f/a. He had not seen the plaintiff again once he left in the ambulance. Bennett also denied that he had accompanied the plaintiff in the ambulance or that he had seen him after the incident. There was no reason for Prentis to lie about whether he accompanied the plaintiff to the hospital and kept him under guard, especially when he admitted that he had arrested the plaintiff at the scene. Both Prentis and Bennett also testified that they had remained at the scene behind to search for the firearm and report on the incident. Therefore although the plaintiff was under guard and advised as to the reason therefor, and Prentis was not present, the conduct of the police did not render the arrest or detention unlawful as the plaintiff was properly apprised of the reason for the guard. Nor could he have been taken to court any earlier than when he was, which was after his discharge from hospital. He was discharged on Friday and taken to court on the Monday. Nor is there reason to find that the defendant should be held liable for the failure to produce the relevant documentation which necessitated the holding of the plaintiff on 20 June 1994.

Malicious prosecution

[10] In **Minister of Safety and Security NO v Schubach** the Supreme Court of Appeal confirmed that the requirements for a successful claim for malicious prosecution are :

(a) that the police set the law in motion (instigated or instituted the proceedings);

(b) that the police acted without reasonable and probable cause;

(c) that the police acted with malice (or *animo injuriandi*); and

(d) that the prosecution has failed. [17]

[17](437/13) [2014] ZASCA 216 (1 December 2014 at para 11)

[102] It is not disputed that the police did arrest and detain the plaintiff and therefore instigated the charge of attempted murder against him. On the proven facts, it cannot be said that they acted without reasonable and probable cause in doing so. However there is no evidence that they acted with malice or that the prosecution of the plaintiff failed. In the premises the plaintiff's claim for malicious prosecution must fail.

Costs

[103] Although there is little chance of recovery from the plaintiff, there is no reason why costs should not follow the result.

[104] The failure to order costs against unsuccessful litigants because the prospects of recovery from them are poor, may also encourage an untenable proliferation of frivolous and unfounded suits.

Order

The Plaintiff's action is dismissed with costs.

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MOODLEY J

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