



**THE HIGH COURT OF SOUTH AFRICA  
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

**CASE NO: 627 / 2018**

- (1) REPORTABLE: YES  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

**15 October 2019**  
DATE

  
.....  
SIGNATURE

In the matter between:

**SYDNEY NKUNA**

**PLAINTIFF**

and

**MINISTER OF POLICE**

**DEFENDANT**

*Summary:*

*Civil law – Delict – Vicarious liability. Deviation by employee from the scope of employment. Requirements for vicarious liability in deviation cases: Whether employee acts in interests of employer or his own and whether sufficient close link exists between the conduct and the business of employment.*

*An off duty police officer involved in a road rage argument that ends in him shooting and injuring the Plaintiff. Police officer not in uniform and not in*

*marked police motor vehicle and the argument having nothing to do with him executing the scope of his employment.*

*Held – that he acted in his own interests and that there is no sufficient close link between his conduct and the business of his employment.*

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## J U D G M E N T

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### **RATSHIBVUMO AJ:**

#### **1. Introduction.**

This is a claim for damages emanating from the unlawful assault by a member of the South African Police Services (SAPS) on the person of the Plaintiff. The Plaintiff's claim against the Defendant is based on vicariously liability over delict committed by its employee. Pursuant to an agreement reached at the Rule 37 pre-trial conference, the parties requested that the trial should proceed in respect of the merits only and that the quantum should stand over for determination at a later stage; a request acceded to by the court.<sup>1</sup> Accordingly, trial proceeded only in respect of defendant's liability.

2. Following a road rage incident one Friday evening, in December 2013, two motorists stopped on the side of the road to settle their scores face to face. Bolstered by the presence of his younger brother who joined him when he stepped out of the motor vehicle, the Plaintiff must have felt stronger and ready to confront the motorist who overtook him from his left on a yellow lane driving a red VW Golf. The Plaintiff perceived that to be reckless driving especially when after overtaking him, the Golf was

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<sup>1</sup> See Rule 33 (4).

driven very slowly in front of him forcing him to also overtake the Golf. Moments later, the two motorists stopped and it was the Plaintiff who approached the Golf driver away from his brand new VW Polo motor vehicle. The production of a firearm by the Golf driver sent the two brothers rushing back into their motor vehicle to continue the ride in a new car full of the Plaintiff's friends and his brother. That however did not stop the Golf driver from firing shots even as the Polo was driven away, causing an injury to the Plaintiff on the back of his neck. The Plaintiff was treated at a hospital where he was discharged about a week later.

3. Although the red Golf and its driver were unknown to the Plaintiff – after all it was at night; their verbal confrontation made the Plaintiff to have a clue that the Golf motorist must have been a police officer. For according to the Plaintiff, he shouted that “I am a police officer”. Further inquiries about a police officer who drives a red VW Golf led Plaintiff's investigations to Const. Theledi, a police officer attached to Graskop Police Station, some 90 km or so away from the shooting scene. As the information tricked in, it was rumoured that at Graskop Police Station there was a police officer who drove a red VW Golf. Sadly, as the detectives followed up that lead, the visitation by the police investigators to his home on Monday following the date of the incident proved to be tragic. While waiting for the gate to be opened, officers heard a gunshot sound inside the house and when they entered; they found Const. Theledi lying motionless, dead – with a gunshot wound.
4. There is no dispute that Const. Theledi was not on duty at the time of the shooting incident and that the area where the shooting took place is outside the area of jurisdiction for which Const. Theledi was appointed to

work for the Defendant. Again, the man who shot the Plaintiff was not in police uniform or driving a marked police car.

**5. Issues for determination.**

Is it Const. Theledi who shot and injured the Plaintiff? If it was, is the Defendant vicariously liable for his deeds?

**6. Case for the Defendant:**

Mr. Sydney Nkuna: He is the Plaintiff. His evidence can be summarised as follows. He worked for Transnet Freight Rail as a train assistant. On 06 December 2013 around 21h30 and on a public road in Mkhuhlu Trust or Calcutta in Mpumalanga, he was driving in his new VW Polo motor vehicle. He had three passengers inside being his brother, Bekimuza seated on front passenger seat and two friends seated on the back seat. Around that time, his motor vehicle was overtaken by a red VW Golf motor vehicle from his left side on a yellow lane in a manner he considered to be reckless. The said VW Golf then proceeded to be driven in front of him very slowly until he overtook it. It was again driven to overtake him on his left side on yellow lane and proceeded to be driven slowly in front of him. He decided to overtake it again but this time, when the motor vehicles were parallel to each other, he rolled down his front left window and confronted the driver of the VW Golf over his manner of driving. In response, the VW Golf driver insulted him. The motor vehicles continued driving very slowly until they stopped, after the VW Golf was driven so as to block his way.

7. Once the two motor vehicles stopped, he and Bekimuza got out to confront the VW Golf driver asking why he drove in that manner. The Golf driver insulted him, alighted from his motor vehicle and went to its

boot and when he turned, he was armed with a firearm and with it he fired a shot towards Bekimuza. He also instructed Bekimuza to get in the car saying he would die young, and Bekimuza obliged. The VW Golf driver then turned to the Plaintiff and told him, “we are busy working; I am a police officer and you cannot do anything.” Frightened, the Plaintiff got into his motor vehicle and started to drive. He heard more shots being fired as he drove away. Moments later, he realised he was shot at the back of his neck. He then asked Bekimuza to drive him to the hospital which he did. He was treated and discharge about 8 days later. The bullet was not removed and it remains lodged inside his neck.

8. Unlike what was reflected in his particulars of claim prior to their amendment, the VW Golf driver was not in police uniform. He does not know why the initial particulars of claim contained those allegations because that is not what he told his attorney. Again, the VW Golf motor vehicle was not a marked police car and it did not have blue lights.
9. Madzuma Sipho Nkuna: He is the Plaintiff’s brother. He received the news of the incident in which the Plaintiff was injured through a phone call from Bekimuza and he proceeded to visit the Plaintiff in hospital. From the hospital he went about investigating the matter and putting pressure on the authorities to investigate and arrest the person who injured the Plaintiff. His first mission was to confirm with Calcutta Police Station which services the area where the incident took place, that a case docket was opened and if so, he wanted to talk to the Investigating Officer. He proceeded there on 07 December 2013. At the police station, they told him that the Investigating Officer was not in. He then proceeded to visit the scene of shooting together with Bekimuza and there, he found three empty cartridges. That surprised him because

he had been told that the police visited the scene already. He took the empty cartridges to the police station where he handed them over and left.

10. He went back to the police station and this time, he told them that he had information to the effect that the suspect was a police officer. He suspected that it could be an officer who works at Calcutta Police Station named Dalton; for he also drove a red VW Golf. When the word reached Dalton that he was being suspected, Dalton assured him that it was not him since he was on duty elsewhere when the incident happened. He testified that he proceeded to demand answers and arrest of the suspect, and in that process he got information from some of the officers present at the police station that the right suspect was a certain Const. Theledi attached to Graskop Police Station. With lack of trust and suspicion that the police were not hands on, he contacted the provincial police who got involved. He was called to the police station on Monday the 9<sup>th</sup> December 2013 and was informed by a certain Capt. Maphanga that Theledi committed suicide.

#### **11. Case for the Defendant:**

Thulani Maphanga: He is a member of the SAPS and he holds a rank of a Lieutenant Colonel. At the time of the incident, he was the station commander at Graskop Police Station and Const. Theledi served under his command. He testified that Const Theledi was a well-disciplined member of the SAPS against whom there were no criminal records. He also had a clean record internally as he had not been found guilty of any misconduct. He was alerted of the investigations launched against Const. Theledi when the police officers from Calcutta came looking for him over the weekend. These officers told him they wanted to

confiscate Const. Theledi's firearm and send it for ballistic tests. He was not given further details.

12. Const. Theledi was a detective who did not work over the weekends. He told the officers who came looking for Const. Theledi to come back on Monday the 9<sup>th</sup> December 2013. He had hoped to find him during the morning parade. On Monday the 9<sup>th</sup> December 2013, Const. Theledi was not present at work. He then led these officers to Const. Theledi's residence. Once there, a lady came to open the gate and at that stage, he heard a sound of a gun shot from Const. Theledi's house. When they got in, they found Const. Theledi dead, bleeding from a gunshot wound.
13. Const. Theledi had been issued with a firearm that is issued to permanent members of the SAPS when they join the police. He did not have to hand it in and out when he was on and off duty since it was issued to him in terms of what he termed SAPS 108. Firearms issued this way become a property of the said officer even if he/she gets transferred to another police station, hence they always require that officers should have a safe at their respective homes before they are issued with firearms.
14. He testified further that Const. Theledi was not on duty or on stand-by at the time of the incident. If Const. Theledi had some duties to perform in Calcutta, he would have known because since it was outside his jurisdictional area for which he was appointed; Const. Theledi had to apply from him as the Station Commander to get authorisation to perform the duties there. Const. Theledi did not apply for this authorisation and as such, he did not have it.

15. Ellemius Luki Mashego: He is a retired member of the SAPS. In 2013 he held a rank of a Captain and he was a Group Leader in investigations at Calcutta Police Station. He became aware of the docket opened in respect of attempted murder relating to the Plaintiff on Saturday the 6<sup>th</sup> December 2013. The docket was opened by Sgt Matseo. To his knowledge, there is no statement made by a person named Theledi at Calcutta Police Station in respect of this case, or there was, it was not contained in this investigation docket. Although he gave instructions to the investigating officer to take the firearm confiscated after the death of Const. Theledi, to be taken along with the cartridges for ballistic tests, no ballistic test results were in the docket and he could not explain why. The ballistic test results in respect of the firearm used in the killing of Theledi were however available in the inquest docket. He confirmed that he went with Lt Col Maphanga to Theledi's residence where he was found dead.

#### 16. **Applicable law.**

It appears convenient to me to first deal with the question of vicarious liability under the presumption that it was Const. Theledi who shot and injured the Plaintiff. I will however revert to the aspect of the identity later in the judgment. Given the common facts under introduction above, it is clear that this incident did not take place while Const. Theledi was furthering the scope of his employment. The closest it can be aligned to is deviation. Deviation refers to a delict committed in circumstances where an employee has deviated from the normal performance of his/her duties.<sup>2</sup>

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<sup>2</sup> See BOTHA & MILLARD "The Past, Present and Future of Vicarious Liability in South Africa" (2012) 2 *De Jure* 225 at 231



17. The test as to whether to impose vicarious liability in deviation cases was recently visited by the Constitutional Court in *Booyesen v Minister of Safety and Security*.<sup>3</sup> The history of deviation can be traced back to *Minister of Police v Rabie*<sup>4</sup> and was later expanded in *K v Minister of Safety and Security*<sup>5</sup> and in *F v Minister of Safety and Security*.<sup>6</sup> In *Rabie*, the Appellate Division held (per Jansen JA writing for the majority) that,

“It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant’s intention (cf *Estate Van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant’s acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.”<sup>7</sup>

18. This test essentially consists of two questions: first, whether the employee committed the wrongful acts solely for his or her own interests or those of the employer (the subjective question); and second, if he or she was acting for his or her own interests, whether there was nevertheless a “sufficiently close link” between the employee’s conduct and the business of his employment (the objective question).<sup>8</sup>

19. Sufficient close link was expanded under the constitutional dispensation in *K*<sup>9</sup> and *F*<sup>10</sup> to allow holding the employer vicariously liable even

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<sup>3</sup> 2018 (2) SACR 607 (CC) para 11-21.

<sup>4</sup> 1986 (1) SA 117 (A).

<sup>5</sup> 2005 (6) SA 419 (CC).

<sup>6</sup> 2012 (1) SA 536 (CC)

<sup>7</sup> *Minister of Police v Rabie* (*Supra*) at p. 134 C-E

<sup>8</sup> *Booyesen v Minister of Safety and Security* (*Supra*) at para 11.

<sup>9</sup> *Supra*

though the employees' conduct was in pursuit of personal interests. In both these cases, the appellants were raped by police officers at night in circumstances where they trusted the police to offer help and protection which they desperately needed. The police officers pretended to offer that protection; and the victims' trust was earned because they were either in full police uniform and in marked police motor vehicle or because of them professing to be police officers and the presence of the police docket in the motor vehicles.

20. In *Minister of Safety & Security v Booysen*<sup>11</sup> the Supreme Court of Appeal had to consider if sufficient close link existed in a case of a shooting incident involving a police officer. Facts were briefly as follows. The respondent and the deceased were involved in an intimate relationship. The two had known each other for many years. The respondent confirmed that she fell in love with a private individual and not a policeman. At the time of the incident, they had been in the relationship for less than a year. On 22 March 2013 the deceased was on night-shift duty. He was dressed in his full police uniform and armed with a service pistol. The pistol had been issued to him by the shift commander at the commencement of his shift. He had been assigned crime-prevention duties and was required to attend to complaints by members of the public.

21. That night, the deceased was dropped off at the respondent's home by a marked police vehicle. He had gone there to have dinner, as was his routine when he was on duty on Friday and Saturday nights. After he had eaten, the police vehicle would collect him and he would continue with his shift duties. The deceased first went to buy soft drinks from a

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<sup>10</sup> *Supra*

<sup>11</sup> (35/2016) [2016] ZASCA 201 (9 December 2016).

nearby shop. On his return, he offered these to the respondent and her family. After supper, he and the respondent sat outside together. Suddenly, and without warning, the deceased drew his service pistol and shot the respondent in the face. He then turned the firearm on himself and committed suicide. The last words uttered by the deceased were to the effect that, if he could not have the respondent, then nobody else could. The respondent testified that she and the deceased had not argued before the incident and they did not have problems in their relationship. As a consequence of the gunshot, the respondent sustained injuries to her face. She was admitted in a hospital where she was treated and discharged.

22. The trial court had found the Minister of Safety and Security vicariously liable and it had relied heavily on *Pehlani v Minister of Police*.<sup>12</sup> In *Pehlani*, the Western Cape Division (per Rogers J) had found the Minister of Police vicariously liable in circumstances largely identical to those in *Booyesen*. Just as was in *Booyesen*, the police officer had shot a lover in a situation of “if I cannot have you, nobody else will...”, in an area outside where she was posted to be on duty, using a police issued firearm and she was in police uniform at the time.

23. On appeal, the Supreme Court of Appeal did not follow *Pehlani*. In applying the “sufficient link” test, the SCA held that the answer to the first question — whether the wrongful act was done solely for the purpose of the employee — did not establish liability on the part of the employer because the deceased acted for his own interests. This conclusion was based on the following:

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<sup>12</sup> (9105/2011) [2014] ZAWCHC 146; (2014) 35 ILJ 3316 (WCC) (25 September 2014).

- a) The deceased was on a private visit to his lover's home, having gone there to have supper.
- b) He was not there in his capacity as a police officer and he had no official police function to perform.
- c) The visit was purely social and at the time that he was permitted to be away from the police station for a meal break.
- d) The break had nothing to do with his employer any more than it would have had anything to do with his employer's business if he had been sitting having a meal in a café or purchasing a takeaway at a fast-food restaurant.<sup>13</sup>

24. With regard to the second question — whether a sufficiently close link nonetheless exists — the majority held that there was not a sufficiently close link between the employee's act for his own interest and the purposes and business of the employer. Its conclusion was based on the following.

- a) When the shooting took place, the applicant and the deceased were not relating to each other as police officer and citizen but were lovers in a domestic setting.
- b) The applicant confirmed during her testimony that she and the deceased had no relationship problems and had not argued before the shooting. The shooting was not foreseen either by the applicant or SAPS. There appeared to have been no sign at all that the deceased would have done what he did.
- c) The applicant did not repose trust in the deceased due to his employment as a police reservist with the SAPS.
- d) The applicant did not fall in love with the deceased because he was a police officer.

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<sup>13</sup> See *Minister of Safety and Security v Booysen (Supra)* at para 14.

- e) There was no situation which called upon the deceased to act as a police officer at the applicant's home.
- f) There was no evidence that when the deceased was employed and issued with a firearm, the management of the SAPS was aware or should have been aware that this created a material risk of harm to the community.<sup>14</sup>

## **25. Applying legal principles to facts:**

*In casu*, applying the same test, I find that Theledi was not pursuing his employer's interests when he interacted with the Plaintiff. This is because of the following:

- a) He was not on duty when he interacted with the Plaintiff.
- b) He was just a private motorist on the road driving like any other road user.
- c) There is no evidence suggesting he was driving his employer's motor vehicle.
- d) He and the Plaintiff did not know each other and nothing happened between them that could have formed the basis for him to act in the scope of his employment.

26. On the second question of the test: whether there exists sufficient close link I find in the negative for the following reasons:

- a) Const. Theledi was not in police uniform when he interacted with the Plaintiff.
- b) He was not driving a police marked motor vehicle.
- c) He was unknown to the Plaintiff, and as such the Plaintiff had no reason to suspect that he was a police officer from his mannerism and appearance.

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<sup>14</sup> See *Minister of Safety and Security v Booysen (Supra)* at para 18-19

- d) No trust relationship existed between the Plaintiff and Theledi in terms of which the Plaintiff could have expected Theledi to perform his police obligations expected of him by virtue of his employment as a police officer.<sup>15</sup>
- e) There is no evidence suggesting that the police management was negligent in issuing Const. Theledi with a firearm as there was no evidence prior to the issuing suggesting that he was dangerous or he could become dangerous if issued with a firearm.

## **27. The police issued firearm.**

It was submitted on behalf of the Plaintiff that given the fact that Theledi made use of police issued firearm, and the same was not taken back when he was off duty, in line with *Pehlani's* approach, Const Theledi's employer should be held vicariously liable for the wrongful acts by Theledi using the same firearm. In supporting this view, counsel for the Plaintiff quoted section 98(5) of the Firearms Control Act<sup>16</sup> which provides,

(5) Unless the permit referred to in subsection (2) indicates otherwise, the employee must-

- (a) when on duty, carry any handgun under his or her control on his or her person in a prescribed holster;
- (b) at the end of each period of his or her duty, return the firearm in question to the place of storage designated for this purpose by the Official Institution; and
- (c) when traveling with a firearm, carry the firearm on his or her person or in a secure place under his or her direct control.

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<sup>15</sup> See the "trust" element introduced to the test in *K v Minister of Safety and Security* and in *F v Minister of Safety and Security*(*Supra*).

<sup>16</sup> No. 60 of 2000.

- (6) (a) Despite subsection (5), the head of an Official Institution may authorise an employee to-
  - (i) have the firearm in his or her possession after his or her working hours;
  - (ii) carry the firearm on his or her person outside the premises of his or her workplace; or
  - (iii) store the firearm at his or her place of residence. [My Emphasis].

28. It appears the counsel placed some emphasis on words contained towards the end of section 98(5) and ignored the first part altogether. The plain language of the legislation is that all the provisions about booking in and out of firearms would apply “unless the permit referred to in subsection (2) indicates otherwise.” It is my understanding that this entails that the head of the institution and in this case, the SAPS, is authorised to issue firearm permits in terms of section 98 (2) which would not require firearms to be handed back when officers report off duty; provided that such permit would contain such stipulation. Section 98(2) referred to provides,

“(2) Only the head of an Official Institution, or someone delegated in writing by him or her, may issue a permit to an employee of that Official Institution to possess and use a firearm under its control.”

Section 98(7) & 98(8) further provide,

“(7) The holder of a permit contemplated in subsection (2) must carry that permit on his or her person when he or she is in possession of a firearm.

(8) The head of an Official Institution may only issue a permit in terms of subsection (2) if the employee-

- (a) is a fit and proper person to possess a firearm; and
- (b) has successfully completed the prescribed training and the prescribed test for the safe use of a firearm.”

29. Lt Col Maphanga testified that firearms are issued under two different authorisations, one being what counsel was reading from section 98(5) of the Firearms Control Act in which officers are given firearms only when they are on duty which are returned when they are off duty; and another under SAPS 108 which are the firearms given to police officers when they get permanently appointed into the SAPS. Under this authorisation, police officers keep the firearms as theirs even when they get transferred; hence they have to acquire safes before they are issued with these firearms – for they are expected to keep them in a safe at their respective homes.

30. In *Booyesen* and in *Pehlani*, the courts dealt with police reservists who were issued with firearms when on duty, which firearms had to be returned when off duty. Thus in *Pehlani*, Rogers J was at liberty to critique how the authorisation was given to a reservist under the spotlight of section 98(5) of the Firearms Control Act as it was the section applicable to the facts before him. This case is different because it deals with the firearms issued under the provision... “unless the permit referred to in subsection (2) indicates otherwise...” which according to Lt Col Maphanga, it refers to where a firearm was issued to a member permanently.

31. The argument to the effect that the Minister created the risk in issuing Theledi with a firearm was raised successfully in *Booyesen* before the



trial court. In reversing the decision of the trial court, the SCA held that there was no evidence that when the deceased was employed and issued with a firearm, the management of the SAPS was aware or should have been aware that this created a material risk of harm to the community. As observed by the Constitutional Court, “there was no evidence that the deceased was a danger by being given a firearm. Consequently, the Supreme Court of Appeal overruled *Pehlani* to the extent that it imposed vicarious liability merely on the basis that the SAPS had issued a firearm to a police officer who subsequently committed a delict with it.”<sup>17</sup>

32. Equally, it cannot just be assumed that the mere fact that Const. Theledi committed delict with a State issued firearm, then it means the issuing of the same firearm to him was reckless. Evidence on record is that Const. Theledi was a well-disciplined member of the SAPS against whom there was no misconduct or criminal record. How is the employer therefore expected to have foreseen that this man with a clean record was one day going to use the firearm to commit delict?

### **33. Was Theledi the person who shot at the Plaintiff?**

It cannot be said that the Plaintiff was able to prove on balance of probabilities that the person who shot at him was Const. Theledi for the following reasons: He did not know him prior to that date. They were meeting for the first time at night and it was dark. He was shot by a motorist following a road rage or traffic intolerance incident. Coincidentally, two police officers came up as individuals who drive red VW Golf motor vehicles. The car registration number plates of the red VW Golf involved in this incident remain unknown. Dalton’s

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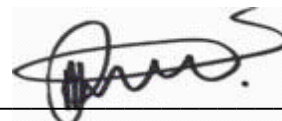
<sup>17</sup> *Booyesen v Minister of Safety and Security (Supra)* at para 32.

firearm was not excluded that it was not used in the incident. The ballistic tests on Theledi's firearm and the cartridges obtained from the shooting scene were not done or if they were, the results were not made available to this court.

34. The police's investigations which appear to have been too slow and despite several requests and instructions from Capt. Mashego in the investigations diary, no ballistic results were obtained. The Plaintiff not being a police officer can only take this aspect as far as a member of the public can. However, for the reasons that even if this was established and proved, Theledi's employer cannot be vicariously held liable for his deeds; I see no reason to make a finding regarding the identity of the a person who injured the Plaintiff.

35. It follows therefore that with the above, the Defendant cannot be held vicariously liable for injuries that the Plaintiff sustained.

36. Consequently, the following order is made.  
The Plaintiff's claim is dismissed with costs.



**TV RATSHIBVUMO**  
**ACTING JUDGE OF THE HIGH COURT**

**FOR THE PLAINTIFF**

**: MR WP MENTJIES**

**INSTRUCTED BY**

**: MENTJIES & KHOZA ATTORNEYS**

**MBOMBELA**

**FOR THE DEFENDANT**

**: MR GK SLABBERT**

**INTRUSCTED BY**

**: FREY ATTORNEYS  
MBOMBELA**

**DATE HEARD**

**: 17 SEPTEMBER 2019**

**JUDGMENT DELIVERED**

**: 15 OCTOBER 2019**