

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 46394/2011**

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

.....  
DATE

.....  
SIGNATURE

In the matter between:

**MOTA, TSIETSI ISAAC**

1<sup>st</sup> Plaintiff

**MOLOTO, SELBY**

2<sup>nd</sup> Plaintiff

**MAZIYA, MUDUUZI SELBY**

3<sup>rd</sup> Plaintiff

**MAGAGANE, MAKAFELA**

4<sup>th</sup> Plaintiff

and

**MINISTER OF POLICE**

Defendant

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**J U D G M E N T**

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## **BHAYAT, AJ**

### **INTRODUCTION**

[1] The four plaintiffs instituted a claim for damages against the defendant alleging that they were unlawfully arrested and detained by member(s) of the South African Police Services (“SAPS”) on 12 December 2010 at about 02h00. In addition, the 4<sup>th</sup> plaintiff claimed damages as a result of being wrongfully and unlawfully assaulted by member(s) of the SAPS.

[2] The parties had agreed that the four plaintiffs had been wrongfully arrested and detained by the SAPS for approximately ten hours before being released. It was agreed that each plaintiff would receive compensation in the amount of R45 000 arising from their wrongful arrest and detention. This aspect was settled out of court.

[3] The trial proceeded in respect of the assault on the 4<sup>th</sup> plaintiff (hereinafter referred to as “the plaintiff”).

### **THE PARTIES**

[4] The plaintiff is Makafela Abram Magagane, an adult [.....] student at SRC [.....], residing at [.....]. He was born on [.....] and was [.....] years old at the time of the incident (now .....).

[5] The defendant is The Minister of Police acting in its official capacity.

### **PLEADINGS - CAUSE OF ACTION**

[6] The plaintiff alleges that on or about 12 December 2010 at approximately 03h00, at or near Grey Avenue in Germiston, he was wrongfully and unlawfully assaulted by a member or members of the SAPS acting jointly and/or severally, whose identities are unknown to the plaintiff, but may have included Warrant Officers Hadzi and Khoza, in that:

- (a) he/they shot the plaintiff from behind and in the back of his head;  
and
- (b) he/they thereafter stamped the plaintiff on the neck with a  
booted foot.

[7] At all material times the said policemen were acting within the course and scope of their employment as policemen of the SAPS.

[8] As a result of the assault, the plaintiff had to undergo medical treatment and suffered contumelia. As a consequence of the foregoing, the plaintiff alleged he suffered the following damages in the amount of R804 520-51 made up as follows:

Patrimonial loss:

- |     |                                   |             |
|-----|-----------------------------------|-------------|
| (a) | Past medical expenses             | R 4 520-51  |
| (b) | Estimated future medical expenses | R100 000-00 |
| (c) | Estimated future loss of earnings | R100 000-00 |

Non patrimonial loss:

- |     |   |             |
|-----|---|-------------|
| (d) | Pain and suffering:<br>Pain and suffering and disfigurement<br>caused were initially severe and thereafter<br>abated but presently still subsists in regard<br>some of the injuries | R500 000-00 |
| (e) | Contumelia  | R100 000-00 |

[9] He now claims payment of R804 520-51 plus interest at the rate of 15.5% per annum from date of judgment to date of payment and costs.

#### FACTS IN DISPUTE

[10] The defendant disputes the assault and the direct cause of the plaintiff's injury and whether the injury was caused by a bullet or a glass.

[11] Save for the past medical expenses, the defendant disputes the quantum claimed.

#### PLAINTIFF'S CASE

First witness : Makafela Abram Magagane

[12] Plaintiff testified that he and the other plaintiffs were travelling in a silver Volkswagen Polo ("Polo") from the Mariston Hotel and Residential building ("the Mariston") in Johannesburg to Germiston. They had visited a friend of the 2<sup>nd</sup> plaintiff at the Mariston.

[13] He knew the 3<sup>rd</sup> plaintiff as they come from the same area in Limpopo. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs were friends of his cousin. Plaintiff was supposed to sleep at the 3<sup>rd</sup> plaintiff's house in Germiston.

[14] On returning to Germiston, plaintiff was asleep in the back seat of the Polo and was oblivious to what had transpired until he felt a trickle of blood oozing from behind his left ear.

[15] He had woken up and ascertained that he had been hit by a bullet fired by a policeman. The bullet had shattered the rear windscreen of the Polo. He was unaware of the events leading up to the shooting but learnt that the police had given chase as a result of alleged negligent and reckless driving.

[16] Plaintiff was accused of being the driver and falsely charged whereas it was the 1<sup>st</sup> plaintiff who had been driving. Under cross examination, it was

established that the State did not proceed with these charges against him but had proceeded to charge Pugo Khosi Keabetsoe for reckless and negligent driving, which charges were later withdrawn.

[17] He also learnt that the police had accused the plaintiffs of attempting to hijack a truck along the highway. As they did not stop, the police had fired at their vehicle.

[18] Plaintiff testified that the shooting occurred on Grey Avenue Dinwiddie Germiston. Several police vehicles were at the scene. He was transported by ambulance to the Tembisa Hospital. At the hospital a nurse had wiped the blood and the wound was plugged with cotton wool. He was not admitted. He was simply treated and discharged.

[19] The same police officers who were involved with the car chase then took him from the hospital to the Germiston Police Station where he was placed in a cell. He was released between 20 and 24 hours later.

[20] As the wound did not heal, he had visited the Netcare Union Hospital on 17 December 2010. X-rays were taken and it was found that bullet shrapnel was lodged in his head, above his left ear. He was operated on the same day and the shrapnel was removed. He was admitted at 16h00 on 17 December 2010 and discharged at 11h00 on 18 December 2010.

Second witness : Rolene Hovsha

[21] Ms Hovsha holds a B.A Hons (Applied Psychology) and M.A (Clinical Psychology) (cum laude) with a special interest in neuropsychology. The witness has twenty three and a half years experience as a clinical psychologist and has practised in both South Africa and Australia. In addition, in the past ten years, she has also practised as a neuropsychologist.

[ 22] The plaintiff's attorney had requested the expert witness to undertake a psycho-legal evaluation to establish the sequelae of the plaintiff's traumatic brain injury, his mental state and emotional impact of his injuries.

[23] The evaluation was conducted on 29 January 2014. In clinically evaluating and compiling her report, Hovsha had regard to the Netcare Union Hospital records, the reports of two neurosurgeons, namely Drs Repko and Segwapa. Dr Repko had passed away prior to the hearing and therefore the plaintiff had subsequently consulted with Dr Segwapa. As a result plaintiff was re-evaluated by Dr Segwapa.

[24] In amplification of her report dated 30 January 2014 (Exhibit A) and addendum thereto (Exhibit A1), Hovsha testified that she had seen the plaintiff on one occasion lasting approximately five hours during which time a neuro and clinical psychological assessment was carried out.

[25] The plaintiff complained about the following to her:

- (a) He suffers from headaches about two to three times a week and uses over the counter medication to ease the pain;
- (b) He suffers from itchiness on the site of the operation;
- (c) He reports symptoms of Post Traumatic Stress Disorder as a result of the incident. These include nightmares related to the incident; he has intrusive thoughts about the incident; he gets angry at times because he doesn't understand why they shot at him; he gets anxious when sees a lot of blue lights; he is anxious when he is a passenger; he is hyper vigilant.;
- (d) He worries that he may be found guilty of something he didn't do;
- (e) His concentration is not as good as it used to be;

- (f) His hearing is poor in his left ear.

[26] Hovsha testified to the results of the investigation as follows:

Neuropsychological deficits:

- (a) Impaired auditory attention, concentration and tracking;
- (b) Severely impaired numerical reasoning which requires the capacity for attention;
- (c) Severely impaired mental control;
- (d) Severely impaired motor persistence, sustained attention, response speed and visual motor co-ordination;
- (e) Severely impaired capacity for abstraction and no verbal concept formation, visual analysis, planning and visu-motor co-ordination;
- (f) Severely impaired ability to translate two dimensional pictures into three dimensional objects;
- (g) Severely impaired visuo-spatial and constructional skills, spatial organisation and planning;
- (h) Impaired motivation;
- (i) Impaired initiation and the ability to generate new information;
- (j) Impaired error awareness, self monitoring and self regulation;
- (k) Severely impaired judgement;
- (l) Severely impaired delayed auditory recall;

- (m) Severely impaired working memory; and
- (n) Severely impaired logical or narrative memory which is the ability to recall auditory information presented in a logical manner without rehearsal.

Emotional functioning:

- (o) Moderate depression; and
- (p) Symptoms of Post Traumatic Stress Disorder

[27] The neuropsychological assessment revealed deficits in several areas of functioning including attention, motor speed, visuo-praxis, executive functioning and memory. This is in keeping with the focal injury to the wound site in the left temporo-parietal area found on the CT scan.

[28] Injuries associated with temporo-parietal lesions typically give rise to the following problems:

- (a) A disturbance of auditory sensation as well as auditory perception;
- (b) A disturbance of selective attention of auditory and visual material;
- (c) Poor recall of verbal and visual information;
- (d) A disturbance of visual perception;
- (e) A disturbance of language comprehension;
- (f) Impairment of long-term memory;
- (g) Altered personality and affective behaviour;



- (h) Poor memory for verbal material;
- (i) Impaired knowledge of numbers and their relationships;
- (j) Poor manipulation of objects;
- (k) Impaired reading and writing; and
- (l) Impaired memory.

[29] The plaintiff showed impairments in many of the above areas and tested poorly on tests measuring these abilities. Prior to the incident, plaintiff appeared to have been functional in all areas, namely, physically, cognitively, academically, socially and emotionally. These are indicative of a moderate focal traumatic brain injury. Attention and memory are particularly affected by depression and anxiety.

[30] The headaches would aggravate the plaintiff's depression and, in turn, impair his cognitive functioning. A significant period of time has elapsed since the incident (three years at the time of the report). Therefore the deficits are likely to be of a stable and permanent nature and are unlikely to improve over time.

[31] Hovsha had recommended that the plaintiff be referred to a psychiatrist to treat his depression and Post Traumatic Stress Disorder over a period of five years; that the initial session would cost R2 500 and the cost of ten sessions in the first year would be R1 100 per session; six sessions in the second year at a cost R1 100 per session and three sessions per year for the remaining three years at a cost of R1 100 per session. Thus the total cost for psychiatric treatment could be R30 000.

[32] She further recommended that the plaintiff be referred to a clinical psychologist also for the treatment of his depression and that he would require 30 sessions at a cost of R950 per session. Thus the total cost for this treatment is R28 500.

[33] In addition, she also recommended that plaintiff would benefit from five counselling sessions at the rate R950 per session to understand and cope with his behaviour. This amounts to R4 750.

Dr Segwapa's medico- legal report

[34] After examining and interviewing the plaintiff, Dr. Segwapa concluded the following in his medico-legal report dated 31 January 2014 (Exhibit B):

- (a) Plaintiff enjoyed a healthy physical life before the incident;
- (b) He has reduced hearing capacity in his left ear which needs to be evaluated by an Ear, Nose and Throat surgeon;
- (c) He displays clinical features of Post Traumatic Stress Disorder for which he is required to be evaluated by a clinical psychologist;
- (d) Plaintiff has a 5% risk of developing epilepsy. If it develops, he will require anti epileptic medication for at least five years or longer depending on clinical response;
- (e) Plaintiff will require analgesics for four to five years to manage his headaches;
- (f) He suffered acute pains for two weeks after the incident;
- (g) He suffers from chronic post-concussion headaches. It was well documented in neurosurgical literature that 80% of patients suffering from post concussion headaches recover within two to three years. However 20% of patients remain with the chronic symptoms;

- (h) Amenities of normal living were lost for six weeks after the incident;
- (i) An industrial psychologist should evaluate the impact of his current functional status on his ability to compete in an open labour market;
- (j) It will cost approximately R14 000 per annum to treat epilepsy depending on the type of treatment given;
- (k) A global amount of approximately R25 000 will suffice in the future treatment of his headaches;
- (l) This excludes the fees of other specialists;
- (m) Longevity has not been affected.

#### DEFENDANT'S CASE

[35] The defendant had called a single witness, Warrant Officer Tshililo Peter Hadzi. He has 25 years experience as a policeman out of which 14 years are as a Warrant Officer. He is stationed at the Brixton Police Station and occupied the same position and status at the time of the incident.

[36] On 11 December 2010, he had reported for duty. He was assigned together with his partner, Constable Makhune, to attend to crime prevention along the highways in Gauteng.

[37] Constable Makhune (the driver) and the witness were patrolling the M2 East in a marked police vehicle, namely, a Ford Focus which was adorned with blue lights. As they approached the Joe Slovo offramp, they saw the plaintiffs' Polo travelling at a high speed. They switched on the blue lights and siren, gave chase and even tried to force the vehicle off the road.

[38] The driver resisted their attempts and continued travelling at a very high speed of between 180km to 200km per hour. During the chase, he radioed for other police officers to assist. The Polo joined the N3 towards Durban and then took the Grey Avenue offramp.

[39] The driver went through two red robots. The vehicle began to slow down in Grey Avenue and that was when the witness jumped out of the police vehicle and shouted "police". He was ignored and the driver started to increase speed.

[40] It was raining heavily when the witness fired a warning shot into the ground with his R5 rifle and a second shot at the rear tyre of the Polo. The vehicle then stopped. As the witness got nearer, he saw a crack in the rear windscreen of the Polo. He was approximately 10 meters away when he fired the first shot and 20 meters away when he fired the second shot.

[41] The vehicle stopped and four to five males emerged and walked towards them. They demanded to know why the policemen were shooting at them. They were ordered to sit down and he noticed that one of them was bleeding from his ear.

[42] He called for an ambulance and other police officers. Constable Makhune and himself escorted the ambulance to the Tembisa Hospital. The doctor on duty had advised him that the plaintiff sustained a scratch. The doctor had refused to treat the patient unless they had a police case number.

[43] He had remained with the plaintiff at the hospital whilst Constable Makhune had gone to the police station to obtain the case number. He had returned at 05h00. The plaintiff's wound was simply wiped of blood and plugged with cotton wool by a nurse. He does not know if they took any x-rays or scans.

[44] At approximately 10h00 they had left the hospital with the plaintiff and had driven to the Germiston Police Station where the plaintiff was detained in

the cells. This was approximately 11h00. The detectives had taken over the case from there and he was unsure as to when the plaintiff was released.

[45] He further testified that if the bullet fired from the R5 rifle had hit the plaintiff, he would have died within 30 minutes nor would the doctors have discharged him if this had occurred.

[46] He testified under cross examination that only a small bit of the bullet would hit the intended target and the rest of the cartridge would fall off at the spot where the gun was fired.

[47] He had intended to shoot at the tyre of the Polo. He stated that he believed that the bullet had ricochet, hit the rear windscreen and a sliver of glass from the rear windscreen had caused the injury to the plaintiff.

[48] He confirmed that no complaint had been received that the plaintiffs were involved in a hijacking as stated in the report of Constable Makhune.

## ANALYSIS OF THE EVIDENCE

### Merits

[49] The defendant disputed that the assault took place and that the injury to the head of the plaintiff was caused by a gunshot fired by the policeman and also disputed the quantum claimed.

[50] Plaintiff had pleaded that his neck was stamped on with a booted foot but had led no evidence in this regard. Therefore this aspect requires no further comment.

[51] Its common cause that the Netcare Union Hospital records reveal that there was bullet shrapnel in the soft tissue overlying the left parietal bone behind and above the left ear. There was also a contusion haemorrhage

adjacent to the shrapnel in the left parietal lobe. There was slight peripheral oedema in this region.

[52] It is also common cause that the plaintiff was operated on and the shrapnel was removed from the scalp behind the left ear. The injury sustained is consistent with all the probabilities of the facts.

[53] The facts are that a bullet was fired by Warrant Officer Hadzi at the vehicle in which the plaintiff was asleep in the left rear back seat. It has not been disputed that the bullet had shattered the rear windscreen of the Polo. The dispute centred around whether the bullet had hit the plaintiff. It is abundantly clear from the Netcare Union Hospital records that the injury sustained by the plaintiff is consistent with that of a bullet wound.

[54] The facts do not reveal that the police officer had successfully hit the tyre. On the contrary, the evidence reveals that the bullet had struck the rear windscreen and had proceeded to hit the plaintiff. Warrant Office Hadzi conceded that he did not have sufficient experience in handling this firearm and that he had only used it once previously in a controlled environment at a shooting range. He further conceded that he had missed the target, namely, the tyre.

[55] There is no doubt that the bullet had struck the plaintiff. The evidence of Warrant Officer Hadzi that the bullet had ricochet is based on speculation and conjecture. The officer did not provide evidence to substantiate any of these factors.

[56] On the other hand, the plaintiff's version regarding his injury is consistent with the hospital records and removal of the bullet shrapnel from his head.

[57] I am satisfied that in considering the probabilities, that the probabilities favour the plaintiff who bears the onus. The plaintiff has discharged the onus.

## Quantum

[58] In support of his claim, the plaintiff had delivered three expert reports, namely, a report by a clinical psychologist (Rolene Hovsha) dated 30 January 2014 and an addendum thereto dated 12 February 2014 as well as reports by two neurosurgeons (Drs Segwapa and Repko ) dated 31 January 2014 and 18 January 2013 respectively. The plaintiff made no reference to the report of Dr Repko as he had passed on but placed reliance on the report of Dr Segwapa by whom plaintiff was re-evaluated after Dr Repko's death.

[59] The defendant did not file any expert reports to gainsay that of the plaintiff's. The court can therefore only rely and be guided by the plaintiff's expert reports. Only Hovsha was called to testify.

[60] The amount of R4 052-51 in respect of past medical expenses was not placed in dispute by the defendant. Defendant had conceded during the trial.

[61] The plaintiff placed reliance on Hovsha's report in respect of future medical expenses for the treatment of depression and Post Traumatic Stress Disorder as appears in the addendum to her report.

[62] She also recommended that the plaintiff will benefit from counselling sessions. The required number of sessions and the related costs are noted in the report after she had made enquiries with the other professionals. The number of sessions and the amounts are not in dispute as the defendant did not file any expert report to contest same.

[63] Dr Segwapa stated that the plaintiff has a 5% risk of developing epilepsy. To date, three years after the incident, he has not developed epilepsy and therefore no award will be made in this regard for future medical treatment.

[64] The plaintiff had abandoned the claim for future loss of earnings and therefore no further comment is required on this aspect.

[65] Plaintiff's counsel submitted that an amount of R400 000 would be a just award in respect of general damages and defendant's counsel submitted that an amount of R200 000 would be just and sufficient but did not provide any comparable decision.

[66] In support of plaintiff's claim for general damages, counsel referred the court to comparable cases, namely, *Makupula v Road Accident Fund 2011* (6B4) QOD 48 (ECM) and *Bikawuli v Road Accident Fund 2010* (6B4) QOD 17 (ECB).

[67] In the *Makupula* matter, a five year old boy had suffered from mild to moderate brain injury. The after effects was neurocognitive deficits associated with attention deficit hyperactivity disorder, memory dysfunction, unco-operative and aggressive behaviour, poor concentration, poor executive functioning and poor scholastic performance.

[68] The child also suffered from headaches every one to two days a week and had suffered pain that appeared two to three weeks after the accident. The head injury presented the child with permanent neurocognitive deficits which were attributed to a mild traumatic brain injury.

[69] Consequently the learned judge awarded a sum of R300 000 as fair and adequate compensation for general damages.

[70] In the *Bikawuli* case, the plaintiff (a 16 year old boy at the time of the accident and 30 years old at the time of the trial) suffered a traumatic brain injury of moderate severity. Plaintiff often felt dizzy and suffered from headaches two to three times a week, walked with difficulty and experienced pain in his lower back and right thigh about four times a week. He became anti social, did not play sports any longer and could not remember the previous day's school lessons. He also sustained a 1.5cm scar on the vertex of his head and multiple tiny scars on his face.



[71] The learned judge awarded R135 000 for general damages during May 2009.

[72] According to Dr Segwapa's report, plaintiff was a healthy adult prior to the shooting. He played soccer and also jogged. He now experiences two headache attacks in a week which is localised to the left side of his head. He takes over the counter medication for the headaches. The hearing capacity of the left ear is now poor. Importantly, the doctor states that plaintiff has no memory problems and is of average intelligence.

[73] In additions, Dr Segwapa's report states that the plaintiff has clinical features of Post Traumatic Stress Disorder and that of a mild head injury with focal brain damage. The plaintiff also has 5% risk of developing epilepsy. He had experienced acute pain for two weeks after the accident and now suffers from chronic post concussion headaches, which in all probability, will not abate. The amenities of normal living were lost for approximately six weeks of the accident. Longevity has not been affected.

[74] In determining the general damages, the court has considered the extent of the injuries and sequelae suffered by the plaintiff and the awards made in comparable cases.

[75] It is settled law that a trial judge has a large discretion to award a fair and adequate compensation to the injured party. Comparisons with previous awards made by our courts can be useful where the circumstances are clearly shown to be broadly similar in all material respects – see *Capital Insurance Company Limited v Richter* 1963 (4) SA 901 (AD). No hard and fast rules can be laid down to review earlier comparable awards.

[76] The position has been summarised thus by the Appellate Division in *Protea Assurance Company Limited v Lamb* 1971 (1) SA 530 AD at 535H-536B:

“ . . . the Trial Court or the Court of Appeal, as the case may be, may pay regard to comparable cases. It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation: nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court’s general discretion in such matter. Comparable cases, when available, should rather be used to afford some guidance, in a general way towards assisting the Court in arriving an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.”

[77] The exercise is to compensate the victim and not to punish the perpetrator. Comparisons are seldom genuinely helpful because of different set of facts in each case but is a useful guideline – see *Lamola v Minister of Safety and Security* 2012 (6K6) QOD 111 (GSJ).

[78] The parties had agreed to the amount of R4 520-51 in respect of past medical expenses.

[79] In respect of future medical expenses, I am guided by the report of Hovsha.

[80] The plaintiff had abandoned the claim in respect of future loss of earnings and therefore no further comment is required

## CONCLUSION

[81] I find therefore that the plaintiff has established on a balance of probabilities that he had sustained a traumatic head injury caused by bullet shrapnel fired by Warrant Officer Hadzi. I also find that the plaintiff suffers

from the sequelae of this injury as stated by Hovsha and Dr Segwapa in their respective reports as aforementioned.

[82] I am of the opinion that an appropriate award for general damages is the sum of R300 000.

## ORDER

[83] In the result, the defendant is ordered to make payment to the plaintiff as follows:

- (a) Past medical expenses in the amount of R4 520-51;
- (b) Future medical expenses in the amount of R63 250;
- (c) General damages in the amount of R300 000; and
- (d) Interest on the aforesaid sums calculated at the rate of 15.5% per cent per annum from date of judgment to date of payment.

[84] The defendant is also ordered to pay the plaintiff's costs, which costs shall include the costs of all experts who filed reports and who testified.



**A Y BHAYAT**

**ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT**

***COUNSEL FOR THE PLAINTIFF  
PLAINTIFF'S ATTORNEYS***

***ADV Q R MASHABANE  
RAMAIPADI ATTORNEYS***

***COUNSEL FOR THE DEFENDANT  
DEFENDANT'S ATTORNEYS***

***ADV T NTUNJA  
STATE ATTORNEY JHB***

***DATE OF HEARING  
DATE OF JUDGMENT***

***17 - 18 FEBRUARY 2014  
28 FEBRUARY 2014***