

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 16852/2013

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

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DATE

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SIGNATURE

In the matter between:

NDIMA GIFT THEMBA

Plaintiff

And

MINISTER OF POLICE

Defendant

J U D G M E N T

MAKUME, J:

[1] The Plaintiff issued summons against the Defendant claiming damages under various heads.

[2] It is common cause that on or about the 10th day of June 2011 and at or near Bez Valley in Johannesburg the Plaintiff sustained injuries on his right leg when he was shot with a firearm by a member of the South African Police Services who was acting within the course and scope of his employment with the Defendant.

[3] On his discharge from hospital after 30 days the Plaintiff who was under arrest was detained at Johannesburg Prison until released on bail. On the 29th February 2013 he was acquitted in the Magistrate's Court of all charges preferred against him.

[4] The Plaintiff alleges that the shooting, arrest and subsequent detention were wrongful and unlawful.

[5] The Defendant's plea dated the 16th April 2014 is a bare denial. However, at the commencement of the trial on the 20th February 2015 counsel for the Defendant in his opening address moved an oral amendment to the plea and informed the court that the Defendant admits that the Plaintiff was shot and injured by a member of the South African Police Force. He told the court that the police witnesses will testify that they shot at the Plaintiff to prevent the commission of a crime. He told the court further that the shooting as well as the subsequent arrest and detention were lawful.

[6] Counsel informed the court further that the reason why these admissions were not brought earlier than today is because the policemen

who were involved in the shooting as well as the arrest of the Plaintiff could not be traced until fairly recent.

[7] I granted the application amending the plea which is in keeping with that appears on paragraph 1.3 of the Common Cause Facts document dated the 20th February 2015 which was signed by both parties and handed up to court.

[8] Paragraph 1.3 of that document reads as follows:

“The incident that gave rise to the action and/or claim took place on June 10, 2011. The incident entailed the shooting of the person of the Plaintiff by a Police Officer and the Plaintiff’s subsequent arrest and detention: first at Charlotte Maxeke Hospital under Police Guard. Thereafter the Plaintiff was detained at Sun City Prison.”

[9] The parties agreed on separation of merits and quantum. This judgment relates only to the liability of the Minister of Police. I accordingly made an order in terms of Rule 33(4) separating merits and quantum.

EVIDENCE

[10] The Plaintiff Mr Themba Gift Ndimba testified that he is 44 years old and was 41 years old when the shooting incident happened on the 10th June 2011. He is a married man and is the father of three children.

[11] At the time of the incident he was employed at a Construction Company as a site foreman. Since the shooting incident he is now unemployed. He lives at Number 22 Corner 1st Street and 7th Avenue in Bez Valley, Johannesburg.

[12] On the morning of the 10th June 2011 he did not go to work as he was not feeling well. He went to consult a doctor at a Clinic in Esselen Street, Hillbrow near the new General Hospital. The doctor gave him tablets and at 10h00 he boarded a meter taxi along Pretoria Street heading back home. He was feeling dizzy.

[13] The taxi that he boarded was a Toyota Cressida dark grey in colour. He was the only passenger in the taxi and sat in the front passenger seat. He was seeing the driver of the taxi for the first time on that day.

[14] It was a cold cloudy day and drizzling as a result visibility was limited through the windows because of the mist inside the taxi. He estimated that any person standing 3 meters outside the taxi could not see inside the taxi. He even asked the taxi driver to put on the air-conditioner so that the mist on the window should be cleared. The windows were also tinted.

[15] When the taxi reached 1st Street he alighted and crossed the street in order to get to his home. He alighted from the taxi at the corner of 1st Street and 7th Avenue in Bez Valley. The taxi stopped along 1st Street facing South in the direction of Yeoville.

[16] A document marked Exhibit "A2" was handed up in court which is a sketch plan showing the area around where the taxi stopped. The Plaintiff indicated that his home is along 7th Avenue. When he alighted from the taxi he had to cross over 1st Street in order to get to his home.

[17] He testified that the taxi turned into 1st Street from 8th Avenue. Point "O" on the sketch plan is where the taxi stopped. He told the court that he could not direct the taxi to drive into 7th Avenue as it is a one way street and from where they came they were going to drive in the face of oncoming traffic had they turned right into 7th Avenue. He testified further that as he was walking facing the direction of his home he heard a gun shot he was hit and he fell on the ground. He was walking when he was shot. The bullet had struck him on his right leg from behind. He did not see who shot at him and where that person who shot him was at that time. His leg was broken. The bullet entered at the back and exited on the knee.

[18] Whilst he was lying on the ground a policeman who was carrying a firearm approached him. He asked him why he shot at him and received no answer. A second police officer came and that one searched him and took his two cellphones as well as a small bag that he had fastened to his waist in which were his tablets and medicine. Later on other police officials arrived and an ambulance came that took him to hospital.

[19] He was under police guard at the hospital for 1 month and 3 weeks and on his discharge from hospital he was taken to Jeppe Police Station and

locked up in the cells for 1 week. No one told him why he was being locked up. After 7 days he was taken to court but remained in the cells as he could not walk. He was on a wheelchair. He remained in custody and only after 3 months he was released on bail.

[20] After six days in hospital the police did tell him that he was to be charged with the offence of possession of a firearm without a licence. His trial commenced. He pleaded not guilty and was discharged at the close of the state case in terms of section 174 of the Criminal Procedure Act 51 of 1977.

[21] He testified that on the 10th June 2011 he did nothing wrong that could justify the police officer shooting him and then placing him under arrest. He denies that he was in possession of a firearm.

[22] Cross-examination of the Plaintiff was lengthy lasting over 2 days, during which cross-examining the version of the police officer who shot him was put to him. That version is that the police stopped the taxi by putting on the siren and the blue light and when the taxi stopped that he the Plaintiff jumped out of the front seat, ran across the street and when the police fired a warning shot asking him to stop he turned and pointed a gun at the police. At that time Constable Mathekga shot him. The Plaintiff denied this and stuck to his version as in the evidence-in-chief.

[23] It was further put to him that Constable Mathekga shot him "*in order to stop you from threatening his life and that of his colleague*". The Plaintiff

denied this. The Plaintiff admitted that the police did search him after he fell but denies that they found any firearm in his person.

[24] The rest of the cross-examination dealt with the time when Plaintiff said he left home and arrived at the doctor and further about the condition in the taxi in respect of visibility. At some point the witness was challenged to say if he knows that to drive a motor vehicle with tinted windows was illegal. Whilst I could not follow the relevancy of that questioning I let it pass even though I hold the view that it was irrelevant and did not deal with the real issue before me.

[25] All in all the cross-examination did not damage the Plaintiff's credibility nor did it raise any serious concerns about the reliability of his evidence. He reiterated his version of the events of that day. The Plaintiff closed his case thereafter. The Defendant opened his case and called Mr Kossam Mathuthu. I need to mention also that Mr Mathuthu's statement to the police had been handed in as Exhibit "A3" during the cross-examination of the Plaintiff without any reference being made to it during such cross-examination.

[26] Mr Mathuthu's evidence in court was in many crucial respects in conflict with what appears in his statements to the police. He admitted his signature on Exhibit "A3" and proceeded to tell the court that the statement was never read to him by the police officer before he signed it.

[27] His evidence in court was that after the Plaintiff had shown him where to stop in order to allow him to get off he then saw the police vehicle stop behind him. The Plaintiff got off and walked across the road. He saw the one police officer following the Plaintiff but did not know why. At first he told the court that the Plaintiff was running across the street. Later he changed and denied that Plaintiff was running. He said Plaintiff was walking normally.

[28] He says he followed the police to see why they were going after the Plaintiff but turned back to drive further on when he was stopped by the police and he himself was arrested, handcuffed and taken to a place where he saw the Plaintiff lying down injured. The police accused him or told him that he knew the Plaintiff. He was later called to court to testify in the case against the Plaintiff and does not know what eventually happened.

[29] There is nowhere in his statement to the police nor in his evidence in court where he says that he saw the Plaintiff point the police with a firearm nor does he say that after he was handcuffed and taken to where the Plaintiff was that he saw a firearm. The witness denied that the Plaintiff was running when he got off the taxi.

[30] He told the court further that when he arrived at the police station they asked him where does he stay and where he comes from and if he knew the Plaintiff. He gave the police his personal particulars and told them that he does not know the Plaintiff and that he was seeing him for the first time on that day.

[31] Having been arrested, handcuffed and then put inside the police van when he arrived at the police station he was given a document to sign which had already been written. The statement was never read to him. On a crucial aspect of the case the witness Mr Mathuthu did not corroborate the version of the Defendant. Instead his evidence is more in line with what the Plaintiff testified about.

[32] Constable Mmereki Welcome Mathekga testified that he joined the South African Police Services in 2009 after he had received basic training. He is presently based at Jeppe Police Station. This was the position at the date of the incident.

[33] He testified that on the 10th June 2011 at about 10h00 he and a colleague Ludwick Matodzi Thovakale were on patrol duty in Bez Valley, Johannesburg. They were in a marked police vehicle and both of them wore the official Police Force Uniform.

[34] As regards the weather condition he said it was cloudy and cold but was not raining. They noticed a silver grey Cressida motor vehicle driving ahead of them. There were two persons in it being the driver and a passenger. He could see clearly through the back window. He noticed that the passenger in the Cressida was not at ease as he kept on looking behind.

[35] He told the court that because of the suspicious behaviour of the passenger they decided to stop the Cressida he then put on the siren and blue light indicating that the Cressida should stop. Before the Cressida could stop he noticed the left front passenger door of the Cressida opening slightly and when the Cressida came to a stop the passenger got out of the Cressida and started to run in the direction of 1st Street. When they stopped the Cressida it was driving in 8th Street.

[36] The witness testified that he also got off the police vehicle and chased after the passenger (Plaintiff). As the Plaintiff was running he kept on tucking something on his belt as if to prevent something from falling off. He says he thought that may be the Plaintiff had a firearm. He then shouted at him to throw it away. The Plaintiff did not and kept on running. He then fired a warning shot. Despite this the Plaintiff kept on running and turned right into 1st Street. He followed him and when he the witness turned into 1st Street he found the Plaintiff waiting for him around the high wall at the corner of 8th Avenue and 1st Street. The Plaintiff pointed him with a firearm.

[37] When he noticed that the Plaintiff was pointing him with a firearm he hid himself behind a tree. The Plaintiff turned around and continued to run away. He followed him when he turned right again into 7th Avenue and as he was running away he noticed Plaintiff put away the firearm under his belt. The driver of the police van Ludwick Thovakale was at that time following in the car also chasing after the Plaintiff and when he turned into 7th Avenue he

noticed that Thovokale who was already out of the police van was having his back to the Plaintiff.

[38] The Plaintiff was at that stage between him Mathekga and Thovokale who had his back to the Plaintiff as he was trying to stop his vehicle which had started rolling forward on its own. He testified further that the Plaintiff took out his firearm again. He then decided to shoot the Plaintiff on his right leg.

[39] When he shot the Plaintiff the Plaintiff was running eastward towards his colleague Thovokale. After he shot him the Plaintiff fell into a yard. He ran to him and told him not to do anything funny. After he shot him the Plaintiff again put his firearm away in his waistline. After the Plaintiff fell the witness took the firearm from the person of the Plaintiff and put it on the ground next to where the Plaintiff was lying.

CROSS-EXAMINATION

[40] From the start of the cross-examination of this witness it became very clear that his evidence and that of the first defence witness Mr Mathuthu were in conflict. Constable Mathekga indicated that when he and his colleague stopped the Cressida it was in 8th Avenue when in fact Mathuthu and the Plaintiff had testified that the Cressida taxi stopped in 1st Street after turning in from 8th Avenue. What is surprising is that this aspect was never placed in dispute by Defendant's Counsel when cross-examining the Plaintiff.

[41] He testified that he fired two shots but cannot say how many or if any cartridges were found. He says he left everything to the people who did the investigation. The first shot was a warning shot which he fired at the time that the Plaintiff was still running in 8th Avenue in the direction of 1st Street and the second shot he aimed at the Plaintiff when Plaintiff had already turned into 7th Avenue. This evidence conflicts with that of the Plaintiff and Mr Kossam Mathuthu who testified that when the shot was fired Plaintiff was already in 7th Avenue. This was never placed in dispute by the Defendant under cross-examination.

[42] The witness Mathekga could not explain why is it that only one cartridge was found on the scene and taken for analysis. It was put to Mathekga that the only reason why the second cartridge was not found is because no shot was fired by him in 8th Avenue. He insisted that he did fire the warning shot in 8th Avenue. He further gave an explanation that the reason why the cartridge was not found is because when you fire a bullet using a R5 gun the cartridge is thrown or falls far from the scene or area where it was shot. This explanation was not only nonsensical but was clearly unsubstantiated. There was no evidence that Mathekga is an expert in that field and to make matters worse he could not say if his theory is correct. Why is it that the second cartridge was found on the scene? I hasten to say that Constable Mathekga was disingenuous. He was clearly hiding something and that is that no warning shot was ever fired.

[43] Constable Mathekga says after he shot at the Plaintiff had put back his firearm back under his belt and the reason he did this was because he wanted to protect his colleague who as he says was not aware that Plaintiff was carrying a firearm. He says because he was running he the Plaintiff did not have his firearm in his hand thus it was not visible.

[44] The more the cross-examination continued the more Constable Mathekga repeated that the reason he shot at the Plaintiff was to protect the life of his colleague who had his back to the gunman.

[45] When he was asked if he did tell his colleague why he shot at the Plaintiff he says yes he did and his colleague became scared and worried.

[46] The witness Constable Mathekga was referred to his statement made on the 10th June 2011 at the police station. At paragraph 7 of that statement the witness says the following:

“When I turned into 7th Avenue, Bez-Valley he withdrew the gun again and warned to stop again, he ignored my instructions. I shot one again aiming for his legs, then took the firearm and put it into his pants (abdomen) and fell on the ground in front of house no: 6 at 7th Avenue Bez-Valley. I went closer to him and further told him not to make any funny movement and I went straight to where I saw him place a firearm (under the clothes and the abdomen).”

[47] This statement is in direct contradiction with what Mathekga had testified earlier on that is that at the time when he shot the Plaintiff his firearm

was already hidden in his clothes and the abdomen. In this statement he says that the Plaintiff only put away the firearm after he had been shot.

[48] When he was asked to explain why in his statement he never mention that he shot at the Plaintiff because he feared for the safety of his colleague the witness became shifty and conceded that he did not mention it and admits that it was important to have mentioned it in his statement. Later on he said that he saw the Plaintiff pointing a firearm at him but did not see where the firearm came from or where he took it out from.

[49] In an attempt to cover up his earlier glaring contradictions the witness said that the plaintiff took back the firearm into his clothes or abdomen when he was "*in the process of falling*". Further on this aspect he gave a third version which is that the Plaintiff still had the firearm in his hand at the time when he shot him.

[50] He continued and testified that after the Plaintiff had fallen he removed the firearm from him and put it on the ground next to the Plaintiff about 2 meters from where Plaintiff was lying. He indicated that the Plaintiff fell inside the yard at home number 6.

[51] It seems strange that the witness having explained how he feared for the life of his colleague he still put the firearm within reach of the Plaintiff. It must be remembered that the Plaintiff was still awake and alive he could easily have grabbed the firearm and shot at the two policemen. The witness

Mathekga could not give the court any reasonable explanation for that episode. The only reasonable inference to be drawn is that there was no such firearm. I say so because in further cross-examination Mathekga says that after he removed the firearm from the Plaintiff he did not even check it to see if there were bullets in it or not.

[52] He agreed further that no fingerprints were taken on the firearm to connect it with it having been possessed by the Plaintiff.

[53] In another strange twist of the witnesses ridiculous explanation of the shooting incident Mathekga told the court that when he shot the Plaintiff, the Plaintiff was heading towards the gate of house number 6 clearly not facing his colleague who at that time according to him was coming back from his vehicle. When confronted with the question that this therefore means that his colleague was nowhere in danger he answered that he does not understand the question and said they were all in 7th Avenue and said that he cannot remember where the police vehicle was but it was not far from the gate of house number 6.

[54] He further testified that he and his colleague decided to stop the Cressida because the passenger inside who happened to be the Plaintiff behaved suspiciously by looking backwards. There was nothing wrong with the taxi itself. When it was put to him that the evidence of the Plaintiff was corroborated in all respect by the evidence of the defence witness namely the

taxi driver he kept on saying that he does not know that and insisted that the taxi Cressida was stopped along 8th Avenue and not in 1st Street.

[55] Constable Mathekga could also not explain why the taxi driver was arrested and handcuffed. His answer was that he did not arrest him and he does not know fully well what happened except to say that the taxi driver was an important witness to give them information. The taxi driver was a potential witness for the State.

[56] Constable Mathekga is once more being disingenuous because the arrest of the taxi driver could only have been at his or his colleague's instance. He now belatedly distances himself from unlawful arrest of the taxi driver after conceding that there was nothing wrong with the Cressida it was only the passenger who they were after.

[57] The Plaintiff as well as the Defendant's witness namely the taxi driver had testified that it was drizzling when Mathekga is asked to confirm that indeed that on the weather condition and further that as a result of the weather the inside of the taxi was misty he firstly denied that it was drizzling he in fact said there was no rain and secondly he said that he could see clearly inside the Cressida.

[58] The witness confirms that after he had shot the Plaintiff he placed him under arrest. He was asked to explain on which legal ground or basis did he

place the Plaintiff under arrest? He replied that it was for pointing a firearm; and possession of a firearm without a licence.

[59] The Plaintiff stood trial in the Regional Court Johannesburg and was acquitted in terms of section 174 of the Criminal Procedure Act 51 of 1977.

[60] In answering questions by the court he conceded that he does not know why the Plaintiff kept on looking behind and when the Plaintiff was running away he kept on looking behind him. He as a result of that also became suspicious. He conceded that when he shot at the Plaintiff the Plaintiff had his back to him and was not pointing his firearm at anybody.

[61] The next witness was Constable Matodzi Ludwick Thovokale who testified that on the 10th June 2011 at about 10h30 he was the driver of the police vehicle along 8th Avenue in Bez Valley. In his company was Constable Mmereki Makhekga. They were doing patrol duty when he noticed a blue Toyota Cressida motor vehicle ahead of him. He noticed that the passenger in the Cressida kept on looking backward and he did that two or three times. He says that as policemen this looks suspicious and he decided to blow the siren and put on the blue light to indicate to the driver to stop.

[62] His further evidence is that as soon as the Cressida came to a stop along 8th Avenue Plaintiff jumped out and started running along 8th Avenue into the direction of 1st Street. Constable Mathekga also jumped out of the

police vehicle and chased after the Plaintiff. He drove the police vehicle with the intention to block the Plaintiff in front.

[63] When he turned into 7th Avenue the Plaintiff and Constable Mathekga were already running in 7th Avenue. He drove past them and stopped the police vehicle ahead of them and as he was heading towards them he heard a gun shot and he saw the Plaintiff fall next to the gate of house number 6.

[64] He testified that he only heard one shot being fired and never saw the Plaintiff point a firearm at his colleague. When he arrived at the place where the Plaintiff had been he saw a firearm next to his feet. He then kicked it away and searched the Plaintiff.

[65] There are serious and material contradictions not only between the evidence of Makhekga and Thovokale but also between the evidence of both constables and that of their witness the driver of the Cressida.

[66] In the first place Thovokale only heard one gun shot when in fact Mathekga says he shot twice. The fact that Thovokale was driving cannot be used as an excuse that it is possible he did not hear the gun shot.

[67] Perhaps the most glaring contradiction is when Thovokale says that when he heard the only gun shot he was already making his way to meet the Plaintiff who was being chased by Mathekga. It is not that when the shot that hit the Plaintiff was fired Thovokale had his back to the Plaintiff.

[68] Mathekga said he searched the Plaintiff, removed the firearm from him and put it next to him closer to his head and yet Thovokale says the firearm was between the Plaintiff's legs and he kicked it away. That was not the evidence of Mathekga.

[69] Despite the fact that the witness Thovokale was at some stage driving behind the Plaintiff and Mathekga at no stage does he say that he saw the Plaintiff pull a firearm and point it at his colleague Mathekga. Under cross-examination he reiterated that he never in his statement said that he saw the Plaintiff in possession of a firearm. He reiterated several times that he was not in any danger because he never saw the Plaintiff pull out a firearm.

[70] In answering questions by the court he said that when he arrived at the place where the Plaintiff was lying injured he asked him where he got the firearm from and the Plaintiff did not answer him.

[71] The Defendant's last witness was a Mr Andries Ntjane a Prosecutor in the employment of the National Prosecuting Authority. He testified that he holds a B.Proc degree which he acquired during the year 1995.

[72] Mr Ntjane was the Prosecutor in the criminal case involving the Plaintiff. His evidence dealt with the conduct and outcome of the criminal trial and did not in any manner assist the court in determining the issue before me

which is whether the Police had any justifiable reason to shoot and later arrest and detain the Plaintiff.

EVALUATION OF THE EVIDENCE

[73] The Plaintiff was not only an honest witness. His evidence is also reliable and was corroborated by Mr Mathuthu a defence witness.

[74] The same cannot be said about the Defendant's witnesses. The two police officers contradicted each other on very crucial aspects of the facts in this matter. I have no hesitation to find that the version advanced by the two police officers is improbable at its central pillar and lacks credibility at every turn. In my view they both contrived a version where none exists. I do not believe them and I reject their evidence as false beyond any doubt.

[75] In the matter of *Circle Construction (Pty) Ltd v Smithfield Construction* 1982 (4) SA 726 the following was said:

"A defence must be pleaded as well as proved for the Court sits to try issues raised by the pleadings. A defendant who misses his true defence or who has learned of it only from facts which appeared during the trial must therefore raise the defence formally and have it placed on roll."

[76] In this matter up until the 17th February 2015 which is three days before the trial commenced the Defendant's plea was a bare denial. It was only at

the pre-trial conference held on the said date that for the first time the Defendant conceded the following issues:

- 76.1 That the Plaintiff sustained injuries on the 10th June 2011 due to a shooting incident by the Police.
- 76.2 That the Plaintiff was arrested and remained in hospital for a month under police guard.
- 76.3 That on his discharge from hospital the Plaintiff was detained at Johannesburg Prison for two months.
- 76.4 That in the ensuing criminal charges against the Plaintiff on the basis of the statements of the two police officers he was acquitted and found not guilty in terms of section 174 of the Criminal Procedure Act 51 of 1977.

[77] At the commencement of the trial the Defendant's counsel handed up to court by agreement a document titled "*Common Cause Facts*" which document reiterated the admission and concessions made by the Defendant at the pre-trial conference. In the document it was further added that:

- "1.6 *The bullet fired by the Police towards the Plaintiff struck and injured the right lower limb of the Plaintiff. The exact nature and extend of the injury [or injuries] and the sequelae thereof will be dealt with when the quantum part of the claim is dealt with [should that stage be reached]. The shooting of the Plaintiff was intentional.*

1.7 *The Plaintiff alleges that the shooting of and the infliction of the injury on the Plaintiff, his arrest and his subsequent detention it/was wrongful and or unlawful. The Defendant denies this."*

[78] Counsel for the Defendant in his opening address and in a veiled a though to plead material facts justifying the shooting and the arrest said that the shooting of the Plaintiff by the police officer was necessary and inevitable to prevent a crime. No details were provided as to what crime or crimes the Plaintiff was committing which justifies that he be shot and arrested.

[79] When cross-examination of the Plaintiff got under way what was put to the Plaintiff is not what was pleaded. It was firstly put to him that he the Plaintiff had pointed a firearm at the police officer. Secondly, that the life of the second police officer was in danger. From these two statements the following becomes obvious that is that the Plaintiff was not shot because he had pointed a firearm at Constable Mathekga. He was shot at because the life of the second police officer namely Matodzi Ludwick Thovokale was in danger. The evidence of Mathekga is that the Plaintiff has put the firearm under his clothes. It is not that he was pointing a firearm at Thovokale. The question then remain how could it be argued that Plaintiff was threatening to commit a crime namely shoot and injure Thovokale when in fact the firearm was hidden under his clothes.

[80] It is therefore my conclusion that what was pleaded by the Defendant was not supported by the evidence before this Court. I pause here to note that the manner in which the Defendant's version was pleaded demonstrates the

difficulty that is placed before a court where a crucial element or submission in relation to the defence is canvassed for the first time during the trial.

[81] The argument that the witnesses for the Defendant could not be found until fairly recently hence the late amendment to the bare denial is in my view a flimsy excuse. The statements of the two police officers were in the docket and a plea could have thus been drawn based on their statements made under oath when they arrested the Plaintiff. As I see it the evidence of the two police officers did not answer the central case made against the Defendant. Their version distorted the reality of events.

THE CLAIM FOR PAIN AND SUFFERING

[82] In his particulars of claim the Plaintiff says that he was shot several times on his right leg by the police officer without any provocation as a result he suffered pain and was hospitalised at Charlotte Maxeke Hospital for approximately 30 days. The Defendant does not dispute the shooting. I need however to state that it is not correct as the Plaintiff alleges that he was shot several times evidence is that he was shot once on his lower limb.

[83] It is trite law that every infringement of the bodily integrity of another is *prima facie* unlawful. Once an infringement is proved the *onus* rests on the wrongdoer to prove some ground of justification. The state is liable for the acts of a policeman who assaults any person during an arrest performed by

the police officer pursuant to the exercise of a discretion to arrest. See *Minister van Polisie v Gamble* 1979 (4) SA 759 (A).

[84] In the present matter the police officers on their own version chased the Plaintiff simply because he behaved suspiciously. They do not in their evidence say that they wanted to arrest him because he had committed a crime in their presence. The evidence of Mathekga is that he shot him because if he had not done so the Plaintiff would have or might have shot at his colleague. This is mere speculation.

[85] There are conflicting versions by the Defendant's witnesses about the presence of the firearm. It is therefore not surprising that in the subsequent criminal case the Plaintiff was acquitted and found not guilty of having been in possession of a firearm.

[86] In my view the Defendant failed to justify the shooting and injury of the Plaintiff or that it was necessary to effect the arrest. In the matter of *Mabaso v Felix* 1981 (3) SA 86 (A) at page 874B-C the court held as follows:

"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."

THE ACTION FOR UNLAWFUL ARREST AND DETENTION

[87] An arrest and detention is *prima facie* unlawful and once such arrest and detention is admitted the *onus* of proving lawfulness rests on the Defendant. See *Mhayat v Minister of Safety and Security* 2001 (2) All SA 534 Tk.

[88] When the two police officers chased after the Plaintiff who says he was walking and not running he had not committed any offence. They accordingly had no basis or justification to attempt to stop him. The Police witness's version that the Plaintiff was in possession of a firearm was a fabrication by the two police officers hence their versions contradict in that regard.

[89] In the matter of *April v Minister of Safety and Security* 2009 (2) SACR 1 the Honourable Innes J dealt with the requirements of section 49(2) of Act 51 of 1977. This is the section that empowers police officers to use force in effecting an arrest. In that matter the Police had shot at and arrested a person who was fleeing from the scene of a robbery. At page 7 paragraph [5] the court said the following:

“In order to discharge the onus resting upon him, the defendant must not only prove that the Police suspected on reasonable grounds that the plaintiff was part of a conspiracy to rob the cash-in-transit vehicle. This will justify the arrest. He must also satisfy the requirements laid down in s 49(2). In terms of that section the use of deadly force likely to cause either the suspect's death or grievous bodily harm to him is justified only in limited circumstances. There must be acceptable evidence that the Police believed on reasonable grounds that the use of the R5 rifle and the 9 mm pistol to prevent the plaintiff from fleeing or resisting – the only justification raised in the plea – was immediately necessary for their protection or the protection of any other persons; that there was a substantial risk that the plaintiff would cause imminent or future death or grievous bodily harm if the arrest was delayed; or that the offence in question was in progress and was of a forcible

nature involving the use of life-threatening violence or a strong likelihood that it would cause grievous bodily harm (Govender v Minister of Safety and Security 2001 (2) SACR 197 (SCA). My view is that even an acceptance of the police version of the facts the evidence falls short of meeting the requirements for the use of deadly force.”

[90] The version of the police officer is that the Plaintiff was about to enter the premises of house number 6 when he was shot and fell. The other police officer did not see any firearm in the possession of the Plaintiff in any event the Plaintiff was not running to him. The Plaintiff posed no danger to anyone and it was unnecessary for the police to shoot him in order to effect an arrest. If they had any reasonable suspicion that the Plaintiff had committed an offence they could have still pursued him into the premises where he lived and then effect an arrest of justified.

[91] I remain unpersuaded that the arrest and detention was lawful. The Defendant has failed to justify the arrest and subsequent detention.

THE CLAIM FOR MALICIOUS PROSECUTION

[92] In my view no evidence was led to prove a claim under this heading and I say no more on that.

ORDER

[93] For the reasons set out above it is ordered as follow:

93.1 It is declared that the Defendant is liable to the Plaintiff for such damages as the Plaintiff may prove he has suffered as a result of the shooting incident by a member of the South African Police including the unlawful arrest and detention.

93.2 The Defendant is ordered to pay the Plaintiff's costs of suit in relation to the merits of the trial.

DATED at JOHANNESBURG this 05th day of JUNE 2015.

M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	20 TH FEBRUARY 2015
DATE OF JUDGMENT	5 TH JUNE 2015
FOR THE PLAINTIFF	ADV L P MKHIZE
INSTRUCTED BY	DITHEKO LEBETHE ATTORNEYS 83 Market Street Suite 409 Tel: (011) 333-7537 Fax: (011) 333-7547
FOR THE DEFENDANT	ADV R S MOTHIBE
INSTRUCTED BY	THE STATE ATTORNEY 10 th Floor, North State Building Tel: (011) 330-7685 Ref: 2746/13/P11/FM S. Makenna

