



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

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

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DATE SIGNATURE

CASE NUMBER: 13/45391
HEARD: 29 FEBRUARY to 4 MARCH 2016
DELIVERED: 18 MARCH 2016

In the matter between:-

SIBUSISO VINCENT TSHABALALA

Plaintiff

and

MINISTER OF POLICE

1st Defendant

ZAKHELE KUBHEKA

2nd Defendant

JUDGMENT

HERTENBERGER, AJ

[1] This is an action instituted against both the First and Second Defendants in which the Plaintiff claims only general damages in the amount of R600 000.00 (an amendment to the quantum was requested prior to hearing argument, the initial claim had comprised of general damages of R350 000.00 and special damages of R275 000.00, which special damages were abandoned by the Plaintiff) suffered as a result of a gunshot injury, suffered by the Plaintiff personally, which it is common cause, was inflicted by the Second Defendant using his service pistol.

[2] The common cause facts, which also comprise the backdrop to this matter, are briefly the following: That the Second Defendant had arrested the Plaintiff some years prior, which arrest led to the acquittal of the Plaintiff only after he had employed legal representation at his own cost. The shooting occurred on 9 September 2012 at approximately 17:00 at Senaone. Prior to the shooting, the Plaintiff and Second Defendant had an altercation on Mpofu Street (also at Senaone), where-after the Plaintiff, smaller in size and build than the Second Defendant, had utilized a public telephone to call his friends to assist him, who came to the scene and then left in the company of the Plaintiff. The Second Defendant was prior to the first altercation washing his marked Audi A3 police service vehicle. The shooting occurred in Inewempisi Street, Senoane near the Second Defendant's motor vehicle. One shot was fired, which struck the Plaintiff in the left thigh and femur. He was taken to hospital by ambulance.

[3] I am tasked with determining whether the Second Defendant had acted in private defense, or not. Counsel for the First and Second Defendant conceded that the Second Defendant was in fact acting in the course and scope of his employment at the time that the shooting took place and that the issue of vicarious liability on the part of the First Defendant was not disputed. The fact that the Second Defendant fired the shot from his service pistol, was on stand-by duty and was driving a marked police vehicle in any event leaves little doubt as to this fact. For the sake of completeness, this view is

supported by the Supreme Court of Appeal in *The Minister of Safety and Security v F* (592/09) [2011] ZASCA 3.

[4] The Plaintiff testified, as did his friend Sfiso Dlamini. The Plaintiff's testimony can be summarized as follows: He was arrested by the Second Defendant some two years ago on a charge of business robbery of which he was acquitted. He spent no less than R10 000.00 in attorney's fees as a result. He knew the Second Defendant. The Plaintiff was about to visit his girlfriend's house in Mpofu Street when he came across the Second Defendant where the latter was drinking alcohol, whilst his car was being washed. He greeted the Second Defendant's friend, whereupon the Second Defendant asked the Plaintiff, why he was looking at him in a bad manner. When the Plaintiff denied having done so, the Second Defendant approached him and slapped him at least twice in the face. In response the Plaintiff hit back. The two of them then ended up grabbing each other. Bystanders separated them and the Plaintiff went to a public phone container nearby and called his friends, who then came to the scene. The intention was to slap the Second Defendant in further retaliation. As the Second Defendant had a firearm with him, they decided not to continue as intended and walked away in the direction of Mpofu street. Here the Second Defendant arrived driving in his vehicle, one hand on the steering wheel, the other holding a firearm. He alighted from the vehicle and shot the Plaintiff, without any provocation. The distance between them was estimated to be between 50 cm and 1 metre. Only one shot was fired at close range and on the Plaintiff's version he was unarmed and so were his friends. The pain was severe and the ambulance arrived only one hour later. As a result of the gunshot wound the Plaintiff suffered a broken leg and had to have the left testicle removed, as a result of toxins in the bullet having found it's way into the testicle. He was held under police guard, as there had been a charge of pointing of a firearm laid against him. After a three week stay in hospital, the Plaintiff was taken to the holdings cells at Moroka Police Station where he was held for a weekend. The court granted him bail and nothing further has come of the matter. Despite the loss of the left testicle, the Plaintiff informed the court that he was advised by the doctor at the hospital that he would still be able to impregnate a woman. There was no evidence led indicating any other lasting physical effects. Under cross examination the Plaintiff conceded that he had been

angry at the Second Defendant since the arrest two years ago, but denied that he wished to harm him as a result.

[5] The Plaintiff's witness Sifiso Dlamini confirms to a great extent the version of the Plaintiff from the point where the Plaintiff calls his friends to come and assist him in fighting the Second Defendant. Dlamini arrives at the scene of the first altercation, but only after the phone call was made. He is not a witness to the initial altercation, but arrives there after being called and confirms that the intention to retaliate was abandoned as the Second Defendant had a firearm and the Plaintiff and his friends did not – they were thus not in a position to attack the armed Second Defendant. He does however confirm the events at the scene of the shooting and testifies to the fact that some time lapsed between the Mpofu street altercation and the scene where the shooting took place. This is of great significance in this matter. The smaller inconsistencies in the Plaintiff and Dlamini's testimony can in my view be justified by the fact that they viewed the incident from different perspectives, if anything, they add credence to the reliability of their testimony.

[6] At the beginning of the trial, the Defendants' counsel indicated that the Second Defendant and a witness would testify in support of the Defendants' case. Regrettably, the second witness failed to appear in court and as such the Second Defendant's version stands on its own and I must disregard those portions of his evidence, which related to the absent witness, Nhlanhla Ngome as they remain uncorroborated. The Second Defendant testifies that he was busy washing his service vehicle, when the Plaintiff alighted from a black vehicle. He confirms having previously arrested the Plaintiff in respect of a business robbery. Whilst washing the vehicle, he heard someone say "Ja, it is you" and then saw the Plaintiff. The Plaintiff was aggressive and demanded repayment of the money he had spent on legal fees. He told the Plaintiff to leave him alone and carried on washing the car, but was then assaulted by the Plaintiff who slapped and kicked him on his body. Despite wanting to avenge the assault, he did not do so as Ngome physically intervened and told him not to. At this point the Plaintiff's firearm is in its holster clipped to his belt and whilst angry at what happened he is in control of himself. He describes that the Plaintiff had been drinking from a

Savannah bottle and that he was in a fighting mood, also threatening that he was “coming back in a bad way”. Plaintiff then leaves and the Second Defendant continues to wash the car. Not long after the Plaintiff returns in the company of two men, with the intention of attacking the Second Defendant. At this point the Second Defendant is locked behind a gate at Ngome’s home by his friends, as a means of protecting him from the attackers. Whilst locked in the yard, the Plaintiff and his friends warn the Second Defendant that they are leaving to get a gun to shoot him. They leave and Ngome and Second Defendant drive to the latter’s residence in the service vehicle, where the Second Defendant changes his clothes and then returns to Ngome who is waiting in the passenger seat of the vehicle with the intention to drive to the police station to record the incident in the Occurrence Book. Shortly after driving off, the Plaintiff and two of his friends appear and block the vehicles path with their bodies, forcing the Second Defendant to stop. Plaintiff opens the driver side door and tries to pull the Second Defendant out of the vehicle. The service pistol is located in the vehicles side pocket. The Second Defendant reads from the Plaintiff’s body language that he intends to grab the pistol from the side pocket and reaches for the firearm first. In the same breath he sees two of the Plaintiff’s friends near, one of whom wants to hand the Plaintiff a firearm. The Second Defendant intended to fire a warning shot, but strikes the Plaintiff instead. He denies ever intending to shoot the Plaintiff and that he was under threat by the Plaintiff who was about to receive a firearm. The Second Defendant under cross-examination concedes that the firearm had not yet reached the hands of the Plaintiff, when the Second Defendant fired the shot that struck the Plaintiff. Further evidence was led relating to the manner in which the Second Defendant handled his firearm and where the parties were standing, none of which evidence really takes the matter much further.

MERITS

[7] The Defendants in this matter aver that the Second Defendant shot the Plaintiff in private defense. The requirements for this defence are the following¹:

¹ Neethling, Potgieter and Visser *Law of Delict* 7th Edition pp 92 to 94

- (a) The defence must be directed against the aggressor;
- (b) The defence must be necessary to protect the threatened right;
- (c) The act of defence must not be more harmful than is necessary to ward off the attack.

[8] When the facts of the matter are applied to the above requirements, the Defendants find themselves in the precarious position that there is no conclusive and corroborated evidence led by them that there was in fact a second firearm at the scene and if one were to accept that such a firearm was in fact at the scene at Mpofu street, it is conceded by the Second Defendant that it was not yet in the hands of the Plaintiff and therefor I cannot find that the Second Defendant was under sufficient threat by the Plaintiff that he was left no choice but to fire a shot. Taking into consideration the conflicting versions of the witnesses for the Plaintiff on the one side and the Defendants' single witness on the other, there is simply not enough evidence of a threat so imminent that the Second Defendant could on any basis be justified in shooting the unarmed Plaintiff, who is physically weaker than the Second Defendant in an act of private defence, particularly in the absence of a corroborating witness who was sitting in the Second Defendant's vehicle at the time of the shooting. It is in any event unlikely that the Plaintiff would both be reaching for the Second Defendant's service pistol at the same time as he was knowingly waiting for his friend to hand him a firearm.

[9] It follows that in respect of the merits I must find in favour of the Plaintiff, whose version of the events, as corroborated by his witness, is more probable. The single witness for the Defendants became rather evasive and did not appear to be on the face of it a reliable witness. In light of relevant case law and in light of the fact that it is conceded that the First Defendant is vicariously liable for the acts of the Second Defendant *in casu* I am not called upon to make a ruling in this regard.

QUANTUM

[10] Evidence of the fear, discomfort and pain experienced by the Plaintiff was led very briefly. Save for the medical records that were handed up, no evidence was led as

to the possible effects that the injuries may have. I am not under the impression that the leg fracture has had a lasting impact on the quality of life of the Plaintiff. The removal of the left testicle is most likely to have the most far-reaching impact, yet the Plaintiff did not assist the court in respect of the quantum that ought to be awarded in this regard. Whilst he has been assured that he will be in a position to father children, one must be alive to the consequences of the cosmetic effect of this loss on the Plaintiff. I am in a position where I must exercise my discretion in the awarding of general damages to the Plaintiff.

[11] In *Nkosi v Minister of Safety and Security* [2012] JOL 29147 (GSJ) the Plaintiff was awarded an amount of R100 000.00 in general damages in consequence of an assault which resulted in a cut lip and tenderness to his testicles. In *Bantu v Minister of Police and another* [2015] JOL 33018 (GJ) the Plaintiff was awarded R80 000.00 for an assault, during which he was *inter alia* held by his testicles. Plaintiff's counsel referred me to the unreported judgment of Nicholls J in *Sibanda and another v The Minister of Police and another* (2011/23229) in which the Plaintiff was shot in both legs. The aforesaid matter is however different from this matter, as there was evidence to the effect that the injury had a lasting effect on the Plaintiff's mobility. That fact is missing in this matter. The Plaintiff was charged and detained in hospital under police guard for three weeks and upon discharge was taken to a holding cell the night before his appearance in court, whereupon he was granted bail. I cannot ignore that he would in any event have remained in hospital for three weeks, thus the *de facto* detention was only for one night.

[12] Having regard to the evidence before me and comparable case law, I award an amount of R150 000.00 to the Plaintiff in respect of general damages.

[11] In the result the following order is made:

- (1) the First Defendant is held to be vicariously liable for the acts of the Second Defendant and is accordingly to pay the sum of R150 000.00 to the Plaintiff;
- (2) Interest on the above amount at a rate of 15,5% per annum from date of judgment to date of payment;
- (3) Costs of suit, including the cost of the interpreter.

R HERTENBERGER
ACTING JUDGE OF THE
HIGH COURT OF SOUTH
AFRICA—
JOHANNESBURG

APPEARANCES

COUNSEL FOR PLAINTIFF:	ADV. MATHOPO
PLAINTIFF'S ATTORNEYS:	MATHOPO ATTORNEYS

COUNSEL FOR DEFENDANT:	ADV. SITHOLE
DEFENDANT'S ATTORNEYS:	OFFICE OF THE STATE ATTORNEY