

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 21719/2010

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

29 February 2024

In the matter between:

GEORGE SITIMELA

Plaintiff

And

CONSTABLE MPHARA

First Defendant

MINISTER OF POLICE

Second defendant

JUDGMENT

Mdalana-Mayisela J

Introduction

[1] This is an action against the defendants for delictual damages in the sum of R2 000 000.00 arising from unlawful shooting. The plaintiff has also pleaded unlawful arrest and detention but has not claimed damages arising from same in his amended particulars of claim. The second defendant is cited in his official capacity as the political head of South African Police Services ("SAPS"). The defendants have admitted in their amended plea that the first defendant was, at the time of shooting, in the employ of SAPS, and acted within the course and scope of his employment.

[2] Both the issues of liability and damages are in dispute. The defendants have admitted that the plaintiff was shot on 11 June 2007. But they denied that he was shot by the first defendant. In the alternative, they pleaded that the shooting was lawful and reasonable. Further alternatively, they pleaded that the first defendant was acting in self-defence. Further alternatively, they pleaded that the plaintiff was reasonably suspected of having committed a crime of attacking and attempting to rob a member of SAPS of his pistol on or about 11 June 2007, and the arrest was therefore lawful in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the Act").

[3] On the issue of damages, the defendants denied the nature and extent of injuries sustained by plaintiff and sequelae thereof. They also denied that plaintiff suffered general damages and will suffer special damages in the form of future medical expenses.

Common cause facts

[4] On the pleadings and from the evidence led at the trial, the following facts are common cause:

[4.1] The plaintiff was shot in the parking area at Piazza shopping complex, corner Jan Smuts and Republic road in Randburg on the 11th of June 2007.

[4.2] The bullet that hit the plaintiff was discharged from the first defendant's official firearm.

[4.3] The plaintiff was transported to Charlotte Maxeke hospital by the witness, Thandi Ramogase in a private car belonging to unknown person.

[4.4] He spent two days at Charlotte Maxeke hospital and was transferred to South Rand hospital.

The facts in dispute

[5] The following facts are in dispute:

[5.1] Colonel Mudau arrested a lady who was in the company of the plaintiff, Mhlongo, Maskopel (Mpho) and three other ladies.

[5.2] There was an altercation between the plaintiff and Col. Modau about the arrested lady.

[5.3] The first defendant fired a shot at the plaintiff during the said altercation.

[5.4] The plaintiff attacked and attempted to rob the first defendant.

[5.5] That the injuries sustained by the plaintiff were as a result of a shot fired by the first defendant.

[5.6] The nature and extent of the injuries sustained by the plaintiff as the result of the unlawful shooting.

[5.7] The damages suffered by the plaintiff as a result of unlawful shooting.

Issues for determination

[6] The parties agreed that the issues for determination are as follow:

[6.1] Whether the plaintiff has made out a case for unlawful shooting in his amended particulars of claim and in his evidence in court.

[6.2] Should the court find that the first defendant shot the plaintiff, whether the shooting was in self-defence.

[6.3] Whether the plaintiff has made out a case for unlawful arrest and detention in his particulars of claim and in his evidence in court.

[6.4] Whether the plaintiff has suffered general damages and special damages as a result of shooting.

[6.5] The defendant submitted that the court should also determine whether the plaintiff has suffered general damages as a result of unlawful arrest and detention.

Evidence

[7] The plaintiff testified first and called two eye-witnesses and one expert witness. The defendants led evidence of three witnesses, including first defendant.

Unlawful shooting

Evidence for the plaintiff

[8] The plaintiff testified that on Sunday night, the 10th, of June 2007 he received a call from Thabo Mhlango. They met and went to a night club situated at corner Jan Smuts and Republic road, in Randburg. He could not remember the name of the night club. He explained that it was located on top of a motor dealer of the classic cars, and there was also a big parking area on that floor. They arrived at the night club at about 23h00. When they entered the night club, his friend Maskopel invited them to join him at his table. Maskopel was in the

company of four ladies. They enjoyed themselves. At about 03h00 on 11 June 2007, they left and proceeded to their cars which were parked in the parking area.

[9] After exiting the night club he noticed a police van stopped close to the entrance. As they were proceeding to their cars, they were surprised to see the same police van stopping next to them. One policeman alighted from the van and walked towards their direction. He grabbed and dragged one of the four ladies who was in possession of an alcohol bottle towards the police van. He opened the rear door of the van and pushed the lady inside. Before the lady could make a complete entry into the van, he closed the door and it hit her leg that was trapped outside. The policeman was rude and aggressive. The plaintiff decided to intervene, and he spoke to the police man. There was an exchange of words between them while both were holding a rear door of the police van.

[10] At that moment, the plaintiff was surprised and shocked to hear a sound of a gunshot. He heard only one gunshot. He did not see who fired a shot. It was not the policeman he had an exchange of words with. He fell on the ground. He tried to find a balance and raise his head, but he realised that he had no strength and was powerless. He was assisted by a lady and another person who put him inside an unknown car. He was taken to Charlotte Maxeke hospital. On their way to hospital, he could hear that the driver was a lady, and she kept on encouraging him not to fall asleep. He heard when he was in hospital that the driver was Thandi. Inside the car he was in and out of consciousness. He could not remember in detail the treatment that was administered in hospital. He realised when he regained consciousness that he underwent surgery.

[11] After the surgery was performed and regaining consciousness, he was transferred to South Rand Hospital. He was discharged after about six to two months. He attended further treatment as an outpatient for a long time.

[12] He explained that he was shot at the right side of the torso, right below the armpit, more to the back in the rib cage area.

[13] He testified that after his release from police custody, he could not go back to work, he stayed at home recovering for two months. He still experiences excruciating pain sometimes as a result of the injuries. He consults the medical doctor as and when it becomes necessary and takes the prescribed medication. He has lost too much energy, but he understands that age is also a contributory factor. The shooting incident was traumatic. He gets frightened by a gunshot sound, even when watching a television. His lifestyle has changed he is no longer active. He can no longer drive a car in a congested traffic. He does not trust the policemen.

[14] During cross-examination he denied that he attacked the first defendant and attempted to rob him of his official firearm. He also denied that he got shot when he pulled a trigger of the first defendant's official firearm.

[15] Thabo Mhlongo testified that on Sunday, 10 June 2007 he called the plaintiff. They met at East Bank. Afterwards they went to Intersection night club in Randburg. They arrived at Intersection around 23h00. They bought drinks and joined Mpho (Maskopel) at his table. Maskopel was in the company of four ladies. After enjoying themselves they left Intersection. He noticed a police van stopped outside Intersection. As they were proceeding to the cars, the same police van stopped in front of them, blocking their way. A policeman alighted from the van and put one of the four ladies inside the van. Her leg remained outside the van. That lady had an open bottle of beer in her hand.

[16] The plaintiff tried to negotiate with the policeman. He was saying that the issue could be resolve by talking. There was an exchange of words between the plaintiff and the policeman behind the police van. At that stage the rest of their group members were standing at two and half metres from the police van. There was no other group of people close to the police van at that moment. The were people sitting inside the cars and others standing outside in the parking area. There were no people fighting in their vicinity.

[17] A short while he heard one gunshot. He did not see who fired a shot. No one was in possession of a firearm in their group. He ran to hide in between the

cars. When he returned to the scene of shooting, he saw the plaintiff laying down. There were people asking the policemen why they shot the plaintiff. They were asking that question because there was not physical fight between the plaintiff and the policemen. The policemen did not respond.

[18] Thandi took the plaintiff to Chalotte Maxeke hospital. He later heard that the plaintiff was transferred to another hospital situated in Turffontein.

[19] Thandi Ramogase testified that on 11 June 2007 she was in the company of two male friends at the night club in Randburg. They left the night club around 5h00. As they were walking towards their car in the parking area, she saw a police van parked close to their car. There were few ladies and men standing behind the police van. They were arguing with the police. The argument was about the lady or ladies that were arrested for possession of alcohol., She noticed that those people were known to her and she decided to go closer to them. She saw the plaintiff trying to pull a lady out of a police van.

[20] There were two policemen. The first policeman who was arguing with the plaintiff had a bigger stature. The second policeman was standing diagonally behind the one who was arguing, on the side and he was resting his hand on his waist. As the people were asking the first policeman why he arrested the lady or ladies just for being in possession of alcohol at the parking area, the second policeman without saying anything, drew his firearm and he fired a shot. All the people dispersed.

[21] She took cover not far from the scene of shooting. Many people confronted the second policeman asking why he fired a shot. She saw the plaintiff falling on the ground. She alerted the plaintiff's friend.

[22] There was a yellow car that was stopped right behind the police van. The door was opened. They carried the plaintiff and put him inside that car. She stood next to the car for few minutes but there was no one coming forward to assist her. She noticed the car key in the ignition. She got inside the car, closed the doors and drove to Charlotte Maxeke hospital. She tried to keep the plaintiff

awake inside the car whilst driving. On arrival at the hospital the army that was deployed there assisted her and took the plaintiff to casualty. The plaintiff was taken to theatre. She was not allowed to go with him. Afterwards, the doctor came out and asked her what happened. She informed him about what happened. He told her that the plaintiff was lucky to be alive. If she waited ten more minutes, the plaintiff would not be alive.

Evidence for the defendants

[23] The first defendant testified that he is employed by SAPS as a warrant officer, and he is based in Randburg. He has been in the employ of SAPS since 2002. He was holding a rank of a constable in 2007. His duties are to provide protection services in the Randburg area in a bid to fight crime. He received training from SAPS college in Pretoria West on when and how to use a firearm.

[24] On 11 June 2007 at around 5h00 he was on duty with Col. Mudau. They were in uniform and were patrolling in Randburg area in a marked police vehicle. As they were at the intersection at the corner of Jan Smuts and Republican roads, before crossing they spotted about five people, males and females, who were crossing Jan Smuts street. The people were in possession of beer cans and bottles and were drinking alcohol. They obstructed their way. Col Mudau was a driver and he hooted to alert them about the presence of the car. The people continued to walk in the street. They decided to apprehend them. Col Mudau stopped the police van and they both alighted. Col Mudau informed them that they were under arrest. The first defendant attempted to apprehend one of them, but he ran away. Thereafter he managed to arrest a lady. Col Mudau attempted to apprehend others, but they ran away towards Piazza Shopping complex where there was a night club.

[25] The first defendant then put the lady he arrested inside the back of the police van. Afterwards they proceeded to Piazza shopping complex. Upon entering the shopping complex parking area on their left, they met a group of about 20 to 30 people who were fighting. Col Mudau made a U-turn and faced the direction they were coming from in order to shine the light on them. They

decided to alight from the van and approach them. Supt Mudau first stepped out of the van and approached them. He remained in the van with his firearm drawn, and ready for any eventuality. In a blink of an eye, he saw Supt Mudau being accosted by those people.

[26] He then alighted from the van on the passenger side with his firearm in his hand. He walked alongside the van to the back. There were no people on the passenger side of the van. At the back of the van he walked passed the first corner and over to the other corner. He stopped and stood there to observe the situation. He later changed his version and said that *"I was still on my way, as doing that, M'Lady, as I had just turned, and then at the time when I got, I think it is the middle of the back of the motor vehicle, M'Lady, I was shocked to feel that I was being grabbed from the back, from behind, M'Lady, around the corner and grabbed by the collar of the jacket that I was clad on, that I was wearing, M'Lady. ... And then with great power or strength, I was then shoved downwards to the ground. And as that happened I turned and looked around and realized and saw that there were people there. People had just came, arrived there..... No I just bent but did not fall. I was still on my feet. I bent downwards but still on my feet, still standing but bent downwards and in that process, M'Lady, then turned and looked around and saw that there were people who just arrived."*

[27] He demonstrated that as he was bending downwards but still on his feet then another male person came from the corner grabbed and pushed him with full force towards the ground.

[28] Again he later said that *"The first person who did so was a male person. And within a short space of time, in seconds and then suddenly, very quickly someone, some person appeared there. I was standing behind the motor vehicle and having a firearm in my hand and was bending as I was being shoved towards the ground."*

[29] He testified that there were two or three people, including the one that shoved him behind the van. He then said *"I was trying to raise up and move*

forward, to move forward. And trying to run to this one, this corner of the vehicle. M'Lady, since I was focusing on these people, on my back, rather at the back, but with my firearm still in my hand and still in front of me. I was just surprised, shocked when somebody grabbed my hand, the hand that was in possession of the firearm. ...The person grabbed my right hand using a left hand."

[30] He demonstrated that this incident took place in the middle behind the van. The person that grabbed the hand that was holding a firearm came from the right-hand corner of the van where he was heading to. That person grabbed his right hand with a left hand and grabbed the firearm with his right hand. That person then pulled him using both his hands. The first defendant then hit the ground with both his knees. It became clear to him at that time that he was being robbed of his service pistol. He then screamed and shouted in a high-pitched voice, alerting Col Mudau that he was being robbed of his firearm. At that time the assailant's body came down to the height of the first defendant's chest area but still standing and bending over. The first defendant was kneeling on the ground. They continued struggling for a firearm. The other two people were still grabbing and pushing him from the back. Then he heard a banging or blasting sound of a firearm. It was a shot from his firearm. The assailant moved backwards, and he did not see what happened to him afterwards. He remained in possession of his firearm. He described the assailant as a well-built person with much strength and force. He did not tell what happened to the other two assailants when after the discharge of a firearm.

[31] The group of people that were fighting dispersed after the discharge of a firearm. He heard Col Mudau calling his name, and also calling for a backup. Then a group of 10 to 20 people came back shouting "*shoot, shoot, shoot.*" They pushed and shoved him around. He then raised the firearm, aimed it upwards, and fired a warning shot. The people ran towards different directions. There was a vehicle that was stopped right behind the police van. At that time he was still standing at the corner of the van. He saw an injured man being carried and put inside that vehicle. He recognised him as the one who attempted to rob him of his firearm.

[32] As the people were driving leaving the parking area, one man came to him and informed him that the man who tried to rob him of his firearm was injured. He then became frightened and knelt down on his knees where he had been standing. Col Mudau then came to find out if he was fine and he advised him to sit inside the van. As he was sitting inside the van, he spotted drops of blood on the ground. He also testified that at the time of the incident his body was quite thin, and he was smaller than Col Mudau. After they left the scene of the incident they went to the police station, where he opened the case against the plaintiff.

[33] Colonel Solomon Motatile Mudau testified that he is employed by SAPS and is based in Randburg. He has 34 years of service. At the time of the incident, he was a commander and now he is a deputy station commissioner. On 11 June 2007 at around 05.00 am he was on duty together with the first defendant patrolling in Randburg area. They were driving on Jan Smuts towards the intersection of Republic road. He spotted five people crossing the street. One young lady came in front of the van and stood there. He stopped the van and instructed the young lady to move away. She resisted and shouted. She was under the influence of alcohol. He apprehended the lady "*for drunk and disorderly*" and put her into the back of the van. The other four people ran away towards the pub. He then proceeded to one of the pubs where there was a fighting. The name of the pub is Calabash.

[34] They entered the parking area where the pub was situated. He made a U-turn and parked +/- 100 meters from the pub entrance. There were people fighting there. One was on the ground, and he was being kicked by others. Col Mudau quickly stepped out and told the people stop fighting. Some people stopped but others continued to kick the person on the ground. The people that were fighting were under the influence of alcohol. Some of them confronted Col Mudau speaking in Isizulu when he was trying to stop the fight. He was standing between them and the person on the ground. They grabbed him because they wanted to continue kicking the person on the ground. He then called on the radio for a backup. He also called the first defendant to come out of the van. The first defendant alighted and stood on the other side of the vehicle.

[35] Suddenly, he heard the first defendant shouting "*hey they are robbing me.*" He did not go to him. He focussed on the people that were fighting. Then he heard a gunshot. Within a short period he heard another gunshot. The people that were with him slept on their stomachs on the floor. He jumped to the front of the van and towards the cars facing the pub and took cover there. At that time the pub was about to close and there were about 100 people in the parking area. Those who were involved in the fight were plus 10. Only the person that was on the ground was assaulted. Some people were siding with him, and others were assaulting him.

[36] While taking cover, he called for a backup again. Thereafter he shouted asking the first defendant if he was okay. He responded from the back of the van and he said that he was not fine. He then took out his firearm from the holster and went to the first defendant. He found him kneeling on the ground behind the van. There were blood drops next to where he was kneeling. He asked him who fired the shot. He said they were trying to take his firearm and it discharged during the struggle. He made him aware of the blood next to him and asked where the assailant was. He said that they took him. The backup policemen arrived. He instructed Captain Tshabalala to trace the assailant in government hospitals. Later he was informed that the assailant sustained a gunshot wound and was admitted in Charlotte Maxeke Hospital.

Evaluation of the evidence

[37] The onus rests on the plaintiff to prove that he was shot and injured by the first defendant. Once the plaintiff has discharged the onus resting on him, the defendants bear the onus to prove that the shooting was lawful.

[38] It is common cause that the plaintiff was shot by a bullet discharged from the first defendant's firearm. He testified that he did not see who fired the bullet. In considering his overall testimony, I find that there were no improbabilities in his testimony. He did not see who fired the shot because it happened during the exchange of words and while he was holding a rear door of the police van.

He testified that the person that fired a shot was at his blind side. He was an honest and credible witness. He did not falsely implicate the policemen in his testimony. There were no internal inconsistencies in his testimony. He disputed the version of the first defendant about him attacking and attempting to rob the first defendant of his official firearm. He informed the court that the difference between his oral testimony and the particulars of claim, about which hospital he was taken to after he was injured, was a mistake on the part of his attorneys. In any event, it is common cause between the parties that he was taken to Charlotte Maxeke hospital. I accept his explanation. He was corroborated on some material aspects of his evidence by his witnesses. I accept his evidence as true and correct.

[39] Mhlongo was a good witness. He testified that he did not see who fired a shot. He was criticised during cross-examination on the fact that he was standing about two and half meters from the back of the police van, but he could not see who fired a shot. He stated that he was facing and focussing at the back of the van where the exchange of words between the plaintiff and the first policeman was taking place. He did not falsely implicate the policemen on the identity of the person that fired a shot. He was an honest witness. He corroborated the plaintiff on the evidence about the verbal altercation and that the reason for it was the arrest of the lady who was in their company, and whose leg was trapped outside the police van. He also corroborated his evidence that the first policeman was rude and aggressive. He also corroborated him on other aspects of his evidence. He disputed the first defendant's version that the plaintiff attacked and attempted to rob him of his official firearm. There were no improbabilities or internal inconsistencies in his evidence. I accept his evidence as true and correct.

[40] Ramogase testified virtually as she is working in Israel. She was the single witness in respect of the identity of the person that fired a shot. When the Court

is faced with two conflicting versions, it must make findings on the credibility of various factual witnesses; their reliability; and the probabilities¹.

[41] She testified that she saw the first defendant standing diagonally behind the first policeman. He was resting his right hand on his waist. This piece of evidence was corroborated by the first version of the first defendant, where he stated that he was standing behind the police van at the right corner, holding his firearm and ready for any eventuality.

[42] She saw the first defendant firing a shot from the place described above. This piece of evidence is consistent with the gunshot entry wound of the plaintiff situated right under his right armpit in the rib cage area. The plaintiff was shot while standing behind the police van talking to the first policeman.

[43] She testified that the policeman that fired a shot was not the one who was talking to the plaintiff. The one that fired a shot was smaller in stature and the first one had a bigger stature. This piece of evidence was partly corroborated by the first defendant's evidence when he confirmed that, at the time of the incident he was quite thin, and Col. Mudau was bigger than him.

[44] She stated that after she noticed the plaintiff falling, she asked the plaintiff's tall friend to assist her to carry him and put him inside the yellow car. The yellow car was parked right behind the police van. This evidence was corroborated by Mhlongo. He confirmed that he assisted her. It was also corroborated by the first defendant, who testified that she saw a lady and another person carrying his assailant and putting him inside the car that was parked right behind the police van. Thereafter, the car was driven away.

[45] She stated that the visibility was clear. The parking area was lit by the streetlights. She was corroborated by the plaintiff and Mhlongo.

¹ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Cie SA and Others* [2002] ZASCA 98]

[46] There was no contradiction between her evidence and that of the plaintiff and Mhlongo on the number of the people that were at the scene before the shot went off. She confirmed that when she arrived, there were few people. They gradually increased when she was already there.

[47] She testified that she did not know the name of the plaintiff and had never spoken to him before the incident. She knew him by sight. This shows that she was more of an independent witness. She was not biased. She was simply a brave and intelligent woman who drove a car belonging to unknown person to hospital to save the plaintiff's life. She stated that in hospital the doctor said had she waited for ten more minutes the plaintiff could have died. She should be commended for saving a life.

[48] For the reasons stated above, I find that her evidence was clear and satisfactory. She was corroborated by other witnesses. She was honest and truthful to the court. There were no improbabilities and inconsistencies in her evidence. She was a good witness. I accept her evidence as true and correct.

[49] I did not find any material inconsistencies between the evidence of the plaintiff and his witnesses. There were minor contradictions on the time of arrival at the night club and the time the incident occurred. That is acceptable because this incident occurred in 2007. That also showed that the witnesses did not fabricate their evidence.

[50] I find that the plaintiff has discharged the onus resting on him on a balance of probabilities in respect of the identity of the person that fired a shot at him. The plaintiff's evidence on the injuries he sustained as a result of the shooting remained undisputed. The defendant did not lead expert evidence or any form of evidence rebutting causal nexus between the shooting and injuries. I find that the first defendant fired a shot at the plaintiff which made him to sustain the injuries stated in Dr Schnaid's medical report.

[51] Having made the above findings, the onus is on the defendants to prove on the balance of probabilities that the shooting was lawful. The defendants

have pleaded that it was lawful and reasonable, and that the first defendant was acting in self-defence and maintaining law and order.

[52] The test whether a person acted in self-defence is an objective one, which means that when the Court comes to decide whether there was a necessity to act in self-defence, it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating at the time he acted.²

[53] The first defendant was a single witness for the defence in respect of how the shooting occurred. He gave more than one version on how the shooting occurred and who pulled the trigger. In his evidence in chief, first he stated that two people grabbed him and pushed him from the back. He was in a kneeling position. The third person who was well-built and with much strength and force grabbed his right hand and the firearm from the front and pulled him. At that time the first defendant was quite thin and small. There was a struggle for the firearm until the firearm discharged and the person at the front moved backwards. He remained in possession of his firearm. This version was also demonstrated in court.

[54] This version was so improbable considering that the first defendant was quite thin at that time. If indeed there was such attack and struggle, those three persons would have easily overpowered him and dispossessed him of his firearm even before it discharged. I observed that he was struggling to paint a clear picture as to what exactly happened during the demonstration. The people in court laughed at him as he was demonstrating. This version was clearly fabricated.

[55] In oral testimony he said that it was three people that attacked him during the attempted robbery. In his statement that was confirmed by him during his evidence in chief, he said *"As soon as I came to the back of the police vehicle I was attacked by unknown amount of people. One man grabbed me by*

² *Ntsomi v Minister of Law and Order 1990 (1) SA 512 (C).*

the back, where another man tried to grab my firearm.” In the version that was put to the plaintiff he said he was attacked by the plaintiff. He did not mention the other people.

[56] In his evidence in chief first he said he went passed the first corner of the van to the right corner. He stood there holding his firearm and observing the situation. Then there was a sudden change in his testimony, he said when he was in the middle behind the van before he reached the other corner, he was attacked by three persons.

[57] In his evidence in chief he said that the plaintiff pulled the trigger during the struggle and the shot went off. In the version that was put to the plaintiff he also said that the plaintiff pulled the trigger. To Col Mudau he said that the firearm discharged during the struggle, and he did not know who pulled the trigger. During cross-examination when he was told that it was impossible for the plaintiff to pull the trigger because the front part of the firearm was facing the plaintiff. He then said that the plaintiff pushed the trigger towards him.

[58] During cross-examination when demonstrating how they were positioned when the shot went off, he was asked from the positions he described, if the shot went off where could it hit the plaintiff. He indicated the front of his body. But when he was informed that it hit him on the right side of his body, he changed and said they were struggling, and it could have gone anywhere.

[59] For the reasons stated above, I find the first defendant's evidence was of a poor quality. There were material internal contradictions and improbabilities in his testimony. There was more than one version on how the alleged attack and attempted robbery occurred. In my view the only reasonable inference to be drawn from his testimony is that there was no attack or attempted robbery of his official firearm. It was a fabrication intended to justify his unlawful and wrongful conduct of shooting the plaintiff. He was not honest and truthful to the Court. I reject his evidence as false and improbable.

[60] Col. Modau did not see how the shooting took place. He went to the first defendant after the plaintiff was removed from the scene. His testimony could not assist the court in determining the issues. It is my view that his motive for denying the arrest of the lady inside the complex and exchange of words with the plaintiff, was to distance himself from the reason for shooting. If indeed the lady that was inside the van was arrested in the street before they entered the Piazza shopping complex, there would be no contradiction between him and the first defendant about who arrested the lady and why she was arrested. I reject his version as false.

[61] I find that the first defendant was not acting in self-defence when he fired a shot at the plaintiff. The plaintiff and his company were not fighting Col Mudau or the first defendant or any other person in the parking area, and so there was no need to fire a shot to maintain law and order. The shooting was not justified. It was unlawful and wrongful. The defendants have failed to discharge the onus of proving lawfulness on the balance of probabilities.

Unlawful arrest and detention

[62] The plaintiff in paragraph 5 of his amended particulars of claim has pleaded as follows.

"During or about 11 June 2007 and/or at around the vicinity of Randburg, Plaintiff was unlawfully shot at by the First Defendant and subsequent to unlawfully arrested. Plaintiff was then admitted to Garden City hospital until discharge under police detention."

[63] The reference to unlawful arrest and detention was only made in paragraph 5 of the amended particulars of claim. The material facts in respect of the unlawful arrest and detention were not pleaded. The damages suffered as a result of unlawful arrest and detention, if any, were not pleaded. The particulars of claim were amended more than once, but this defect was not corrected. The plaintiff was provided with the police docket before he testified in court, but this defect was not corrected.

[64] In his oral evidence he testified that when he regained consciousness after the surgery, he saw two policemen next to his bed. The nurse informed him that he was arrested and that the policemen came to take him to South Rand hospital. He was handcuffed. Thandi also testified that he visited the plaintiff on the following day, and she found him handcuffed. Captain Tshabalala testified that he arrested the plaintiff in Charlotte Maxeke hospital on the instruction of his commander. He read his Constitutional rights to him while he was unconscious. He did not handcuff him. He spent two days at Charlotte Maxeke hospital.

[65] The two policemen who were present in hospital when he regained his consciousness, they took him to South Rand Hospital. He was treated at South Rand Hospital under police guard or detention. He testified that he was always handcuffed while in hospital. He was discharged from hospital after six to two months. It was unclear as to how many days he spent at South Rand hospital under police guard or detention. After he was discharged from hospital the police took him to Randburg holding cells. He appeared in court the following day. He was released on warning. His criminal trial was remanded on several occasions before it was finalized. He was found not guilty and acquitted.

[66] The defendants have admitted that the plaintiff was admitted in the abovementioned hospitals under police guard. But they disputed that he was detained in the hospitals. They contended that the plaintiff's amended particulars of claim are defective because he failed to establish the five elements of delict, namely, an act, wrongfulness, fault, causation and harm in respect of the unlawful arrest and detention. He also failed to establish an exact period of detention in his amended particulars of claim and in his oral evidence in court. He failed to plead the damages and the amount in his amended particulars of claim. They submitted that the evidence that was led in court on unlawful arrest and detention could not cure the defective amended particulars of claim.

[67] It was conceded on behalf of the plaintiff that the amended particulars of claim are defective in respect of unlawful arrest and detention. Counsel for the

plaintiff submitted that the defect could be cured through the plaintiff's evidence. He also submitted that the court could award general damages for unlawful arrest and detention in exercising its discretion. He relied on the case of *Minister of Safety and Security v Slabbert*³, where the SCA held that;

"The purpose of the pleadings is to define the issues for other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies on. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.

There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial."

[68] I have considered the submissions made on behalf of the parties on this issue. I agree with the plaintiff's counsel that the defect in the amended particulars of claim cannot be cured through the evidence that was led in court. The exact time spent in detention; the conditions of detention, including in holding cells, other than being handcuffed; the damages for unlawful arrest and detention; and amount thereof were not canvassed at the trial. Therefore, I find that the plaintiff has not established a claim for unlawful arrest and detention.

Damages for unlawful shooting

[69] The plaintiff led the expert evidence to prove general and special damages for unlawful shooting. Dr Edward Schnaid testified that he has been an orthopaedic surgeon since 1980. He has an FRCS General Surgery and FCS South African Orthopaedic Surgery. He prepared a medical report and an addendum report for the plaintiff. He first consulted with the plaintiff on 6 June 2011. He took his medical history and previous treatment. He also referred to the hospital records of Charlotte Maxeke hospital and South Rand hospital. He also conducted a physical examination of the plaintiff.

³ (668/2009) [2009] ZASCA 163; [2010] 2 ALL SA 474 (SCA) (30 November 2009) par 11

[70] After considering all the relevant information he concluded that the plaintiff sustained a gunshot wound to the chest and abdomen, and liver laceration.

[71] The plaintiff informed him during the consultation that he has a pain on the right side of the abdomen and spine. He is unable to walk long distances or sit or stand for long periods. He is unable to lift or carry heavy weights. He is experiencing memory lapses and headaches. He uses Grandpa to relieve pain.

[72] During the physical examination he found that there are decreased lumbar spinal movements. The X-rays are in keeping with bony injuries to the 7th and 8th thoracic vertebrae at the level of the bullet injury. There is a lumbar scoliosis at L4/5, L5/S1 and there is a L4/5, L5/1 degeneration. The lumbar spine will need to be put on a spinal program consisting of physiotherapy and anti-inflammatory agents. Should the pain persist, an MRI will be indicated. Demonstration of neurogenic impingement will be an indication for lumbar decompression and fusion. Lumbar disc degeneration is frequently found over the age of 40 years. The patient may have had disc degeneration, but the symptoms were not present prior to the injury. He said that the prognosis for the lumbar spine is poor.

[73] He testified that the plaintiff will in future need the following treatment:

[73.1] Physiotherapy to the lumbar spine for up to 1 year	+/- R 30, 000
[73.2] Anti-inflammatory agents and analgesics up to 1 year	+/- R 25, 000
[73.3] Bracing lumbar spine	+/- R 6, 000
[73.4] MRI lumbar spine	+/- R 12, 000
[73.5] Lumbar decompression and fusion	+/- R180, 000
Hospital stay for 7 days, rehabilitation 6 months	
[73.6] Assessment by a general surgeon	+/- R 20,000

[74] He consulted with the plaintiff again on 20 June 2023. He testified that the injuries, sequelae, prognosis and recommended future treatment have not changed. It was submitted on behalf of the defendants that this version is

improbable because 12 years has lapsed since the first consultation. In my view there is no improbability in this version because the doctor indicated in his first report that the prognosis is poor. The improvement in the plaintiff's injuries and sequelae could not be expected as he has not attended the recommended treatment.

[75] I have considered the criticisms levelled against his evidence on behalf of the defendants. In my view they have no substance. I accept his evidence.

[76] I now turn to the issue of general damages. I take into account the injuries sustained by the plaintiff, and the sequelae as stated in Dr Schnaid's reports and the plaintiff's oral evidence. He sustained serious injuries. He nearly lost his life. Counsel for the parties referred me to previous awards but the injuries in those awards were not similar to the injuries sustained by the plaintiff. It was submitted on behalf of the defendants that R300,000.00 is a fair and reasonable amount for general damages. Counsel for the plaintiff submitted that R500,000.00 should be awarded for general damages. In my view a fair and reasonable amount for general damages is the one that follows.

[77] With regard to the issue of costs, I find no reason why the costs should not follow the event.

Conclusion

[78] I am satisfied that the plaintiff has established on the balance of probabilities that he was shot by the first defendant.

[79] The defendants failed to prove that the first defendant's conduct in causing the injury to the plaintiff was objectively reasonable in the circumstances of this case.

[80] There was no threat to the first defendant's life at the time he shot the plaintiff. There was no attempted robbery of his official firearm. It was not necessary for him to shoot the plaintiff to maintain law and order.

[81] I am satisfied that the plaintiff sustained the injuries mentioned in Dr Schnaid's medical reports as a result of the first defendant's unlawful and wrongful conduct.

[82] I am also satisfied that there is a causal nexus between the damages suffered by the plaintiff and the unlawful and wrongful conduct of the first defendant.

[83] The plaintiff is entitled to be awarded future medical expenses quantified in Dr Schnaid's report in the amount of R273,000.00. He is also entitled to be awarded general damages for unlawful shooting.

[84] The defendants have admitted in their amended plea that the first defendant was, at the time of shooting, in the employ of SAPS, and acted within the course and scope of his employment. Accordingly, the first defendant is liable to compensate the plaintiff for damages suffered as a result of the unlawful shooting.

ORDER

[85] In the premises, I make the following order:

1. The second defendant is liable for the 100% of the plaintiff's damages suffered as a result of the unlawful shooting that occurred on 11 June 2007.
2. The second defendant shall pay to the plaintiff an amount of R273,000.00 for future medical expenses to be incurred as a result of the unlawful shooting that occurred on 11 June 2007.
3. The second defendant shall pay to the plaintiff an amount of R430,000.00 for general damages suffered as a result of the unlawful shooting that occurred on 11 June 2007.

4. The second defendant shall pay to the plaintiff the party and party costs of this action on the High Court Scale.



MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 29 February 2024

Appearances:

On behalf of the plaintiff: Mr M S Motubatse
Instructed by: Ndzalama Ngobeni Inc. Attorneys

On behalf of the defendants: Adv M G Makhoebe
Instructed by: State Attorney, Johannesburg