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

**CASE NO: 2012 - 33658**

|      |                                 |
|------|---------------------------------|
| (1)  | REPORTABLE: NO                  |
| (2)  | OF INTEREST TO OTHER JUDGES: NO |
| DATE | SIGNATURE                       |

In the matter between -

**ADV DEXTER LEE – JAY REYNEVELDT *NOMINE* Plaintiff**  
***OFFICIO* on behalf of THABISO KHETHABAHLE**

**And**

**MINISTER OF SAFETY AND SECURITY, *NOMINE* First Defendant**  
***OFFICIO***

**EKURHULENI METROPOLITAN MUNICIPALITY** Second Defendant

**JUDGMENT**

**MOORCROFT AJ**

### Summary

*Assault – claim based on alleged unlawful shooting that took place on 12 October 2009 - expert evidence – failure to call witnesses to testify on plaintiff's injuries*

*Civil onus - preponderance of probabilities - credibility*

*Failure to call factual witnesses on disputed facts – adverse inference may be merited*

### Order

[1] In this matter I make the following order:

1. *The questions of liability and that of the quantum were separated in terms of rule 33(4) and the trial proceeded on liability only;*
2. *The first defendant is ordered to pay the wasted costs of the parties for the day of 7 March 2024;*
3. *The plaintiff's claim is dismissed;*
4. *Save as set out in paragraph 2 above each party shall pay his or its own costs.*

[2] The reasons for the order follow below.

### Introduction

[3] A *curator ad litem* was appointed for the plaintiff in whose name the summons was originally served. The curator was then substituted as plaintiff. I refer to the injured party as the plaintiff. The defendants are the Minister of Police, *nomine officio* (first defendant) and the Ekurhuleni Metropolitan Municipality (second defendant).

[4] It is common cause between the parties that both defendants employ police officers and that both Services (the SAPS and EMPD) were represented in the area of Palm Ridge during protests on 12 October 2009 when the events described below unfolded. In this judgement I refer to the "police" or "police officers" when referring to officers from both or either of the defendants and identify the officers with reference to their respective services when it is possible to do so.

The particulars of the plaintiff's claim

[5] The plaintiff was born on 16 January 1989 and in the particulars of claim he alleged that he was shot and injured on 12 October 2009 at approximately one o'clock in the afternoon in his yard and outside his dwelling at 2[...], M[...] Street, Extension 2, P[...] R[...], Ekurhuleni. In a subsequent amendment the name of the street was amended to Motlanaga Street. In evidence however Ms Khethabahle, the plaintiff's sister, identified the street as Nhlangano Street.

[6] He alleged that police officers were on the "*street in front of his yard*" on the day and that he was shot in the head by police officers while he was walking from the shack where he lived to an adjacent toilet. The police officers were chasing protesters. As a result of the shot and the negligence of the police officers he suffered serious injuries. It is alleged that the police officers were negligent in that -

6.1 they failed or neglected to take adequate steps to control the crowd and the members of the public who were protesting,

6.2 he was shot without having in any way provoked the police officers,

6.3 he was shot without having committed or participated in the commission of an offence or in illegal conduct,

6.4 there was no warning to the plaintiff to return to the house or to be in a safe place or position prior to shots being fired at him,

6.5 the police officers did not take reasonable steps to avoid shooting innocent persons or persons who are not participating in the protests, and

6.6 by shooting randomly the police officers should have reasonably foreseen that innocent persons including the plaintiff might be shot.

[7] The plaintiff did not receive any medical attention from the police officers but was assisted by members of the public and by members of the media who took the plaintiff to a hospital. He was hospitalised and received medical treatment. As a result of the shooting incident he will require medical intervention in future, he has suffered a severe disability and a loss of amenities of life in that he is unable to work or to live on his own, and he endured and will continue to endure pain and suffering.

[8] By agreement between the parties an order was made that the merits and the *quantum* of the claim be separated and that the matter proceed on the question of liability only before me.

The first defendant's plea and particulars provided in response to pre-trial questions

[9] In its plea the first defendant denies that its officers were at or near the plaintiff's dwelling but admits that its officers were involved in attempting to stop a crowd of people who were blocking the traffic flow on the main road some distance away. The police officers were met with persistent and orchestrated threats, assaults and acts of violence from the protesters. They were subjected to unlawful attacks and were placed in danger of physical harm and destruction of property. The police officers were assaulted when stones, bottles and other objects were thrown at them by the crowd. There were acts of public violence, riotous behaviour and damage to property that required crowd control measures to be undertaken. Members of the public interfered when police officers attempted to carry out their lawful duties and the officers fired rubber bullets at the crowd when they were being assaulted by having projectiles thrown at them and by protesters carrying dangerous weapons.

[10] The members of the crowd were intent on killing or causing grievous bodily harm to the police officers. When they discharged their firearms the officers used such force as was reasonably necessary to protect themselves and to prevent harm by the crowd. They had a duty to protect innocent members of the community and their property from danger and the crowd threatened innocent lives and property. The police were therefore acting in self defence or in a state of necessity. It is alleged in the alternative that the plaintiff participated in these unlawful attacks on the police and was accordingly fully aware of the risks of sustaining injury when he did so.

[11] The other allegations by the plaintiff were denied.

The second's defendant's plea and particulars provided in response to pre-trial questions

[12] The second defendant's plea consists in the main of bald or "no knowledge" denials. Importantly however in the response to the plaintiff's averments in paragraph 14 of the particulars of claim that as a result of the injuries "*sustained as aforesaid*", he underwent medical treatment as set out in paragraph 14 of the particulars of claim, the second defendant pleads in paragraph 15 of its plea that it "*takes note of the allegations contained herein.*" If they were to be read in isolation the failure to deny the averments made means that the averments are admitted but such an admission would be at odds with the denials contained elsewhere. Reading the plea as a whole as I must do it is clear that the second defendant denied that the plaintiff had been shot by police officers.

[13] In its response to the plaintiff's pre-trial questions the second defendant admitted that police officers of the EMPD were in the main road approximately one kilometre from the scene of the incident but stated that they were not in the vicinity of the place where the incident occurred.

[14] It was also confirmed that the second defendant's police officers were in possession of rifles, shotguns and Glock pistols and were issued with rubber bullets.

#### Pre-trial conferences

[15] The first defendant made the following admissions in response to questions posed by the plaintiff in terms of rule 37 (4) in pre-trial proceedings:

15.1           There was a service delivery protest by members of the community on 12 October 2009;

15.2           The first defendant's police officers were in Palm Ridge on the day;

15.3           Members of the police were "*at the time when the patient was allegedly shot were at the scene and or around where the patient was shot*"

[16] The second defendant also admitted that members of the police "*at the time when the patient was allegedly shot were at the scene and or around where the patient was shot.*"

[17] I do not read this answer as an admission that the police officers were in the street outside the yard of the house where the plaintiff lived as alleged in the particulars of claim when he was shot, or indeed that the police officers were on the adjacent property as testified to by the plaintiff's witness. Read in the context of the pleadings as a whole the second defendant admits that its officers were in the area where the house is situated and this is also the evidence of the second defendant's witnesses.

[18] The second defendant was initially not able to locate the house where the plaintiff lived because the name of the street was initially incorrect and the intersection close to the house was only identified at a late stage during trial preparation.

[19] In response to a question posed by the second defendant at pre-trial stage the plaintiff advised that Rebecca Motaung and Nolwazi Motaung were the only two people also residing at the premises.

[20] It was agreed at pre-trial that no evidence would be adduced by affidavit and should circumstances change the parties would approach one another. No such approaches were made by any party.

[21] It was agreed that:

21.1 Documents and copies may be used as evidence without the necessity of formal proof and on the basis that the documents are where they purport to be but without admission of the contents;

21.2 Where a document on the face of it purports to have been created by any person it shall be regarded as having been so created;

21.3 Any party may on notice object to the agreement applying to specific documents in which case the ordinary laws of evidence shall apply;

21.4 Only documents put by either party to a witness or otherwise identified by a party prior to the close of its case shall form part of the documentary evidence.

[22] I directed that a further pre-trial conference be held on 6 March 2024 to identify locations on photographs (used by agreement) of the Palm Ridge area showing the main road where protest action took place and showing a four-way stop street on the main road in close proximity to a place referred to as “Telkom” where the community could access telephone services at a shipping container placed there. The intersection and its surrounds were identified in evidence as the place where protesters gathered and where police officers confronted them.

The plaintiff’s dwelling approximately one km away from the main road is also indicated on these photographs and so identified by the parties. The photographs also show vacant land between the intersection close to Telkom and the intersection close to the house where the plaintiff resided.

### Photographs

[23] The parties placed photographs before the court by agreement and they did so in terms of rule 36 (10). Some of these photographs were taken by members of the press during the unrest on 12 October 2009. The photographs show police officers armed with shotguns and operating in an urban area. A large number of civilians are also shown and many are carrying weapons such as iron bars, knobkieries, and sticks. Police vehicles are visible and police officers are shown facing a large crowd. The plaintiff is shown being carried in a street barricaded with rocks.

[24] The plaintiff also provided photographs of the yard where the plaintiff was allegedly shot showing buildings on the property. These were taken by the plaintiff’s forensic expert and identified by him. During the proceedings photographs were taken of 12 gauge grounds containing rubber bullets and these also form part of the record.

### The plaintiff’s witnesses

[25] The plaintiff called four witnesses: the curator, Adv Dexter Lee – Jay Reyneveldt, the plaintiff’s sister Ms Nolwazi Khethabahle, a friend by the name of Mr Johannes Raithabela Mojatladi, and a forensic ballistics expert, Mr Dave Pieterse.

Adv Dexter Lee – Jay Reyneveldt

[26] The *curator ad litem* testified that he interviewed the plaintiff and his family before accepting an appointment. The plaintiff sustained a severe head injury that inhibited his movement, his ability to communicate, and his independence. The plaintiff has to rely on others for his needs on a day by day basis. For this reason he accepted an appointment as curator.

Ms Nolwazi Khethabahle

[27] Ms Khethabahle testified that in 2009 when she was approximately thirteen years old she lived at the same address as the plaintiff and she still lives there. Her two brothers, the plaintiff and Simphiwe Motaung, also resided at this address together with her parents. They were at home on 12 October 2009 when they heard noise outside the house and when they went outside they observed a group of people at the Telkom container where the four-way intersection is situated. There was an open\14hyhpacce between their house and the four-way intersection where the Telkom container was. They observed the crowd at the Telkom container for about an hour and then they heard gunshots coming from the direction of the Telkom container. The crowd dispersed. Some people run towards their house and they went inside their house. The plaintiff went to his shack and her brother Simphiwe went into his house. Some fifteen minutes later a lady by the name of Lindiwe arrived at the house and informed them that the plaintiff had been shot.

[28] When she went outside with her parents they saw the plaintiff lying on the ground. He was unconscious and there were blood on the side of his head. Simphiwe and Johannes Mojatladi picked the plaintiff up and placed him on the lawn in front of the main house before they went to seek help. The plaintiff was then taken to hospital in a motor vehicle.

[29] Under cross-examination she testified that her two brothers were preparing to go to church at Greenfield Primary School that morning and both were wearing the



red jackets worn by men at the church. There were no general church services and the day in question but she testified that there often were what she referred to as male services attended by the menfolk.

[30] She described the property and the surrounding area. The property consisted of a stand with a main house, a secondary house where her brother Simphiwe Motaung resided, and a shack where the plaintiff lived. The Telkom container was situated about ten minutes' walking distance from the house. She confirmed that the protest was on the main road but said that there was also a group of people and the vacant land between the house and the four-way intersection.

Johannes Raithabela Majatladi

[31] The witness testified that he resided at 2[...] M[...] Street Extension 2 in P[...] R[...]. On the morning of 12 October 2009 he heard people chanting and singing outside and when he went outside he stopped at the plaintiff's house which was the second house from the corner of the street. He stood there watching events at the Telkom container with a number of other witnesses. The Telkom container was about a ten minutes' walk from where he was standing.

[32] He started walking towards the open veld towards the Telkom container when he heard a gunshot. The crowd dispersed. Some of the protesters ran in his direction with the police officers in pursuit and he also ran back to the intersection or corner where he had been standing earlier. He saw a police vehicle driving across the open veld.

[33] He ran onto the property where the plaintiff lived and to Simphiwe Motaung's house. Simphiwe and his friends were playing cards. He could not name the people but in his written witness statement of 2022 he named Simphiwe's girlfriend Lindiwe and one Daiza,

[34] He ran into the kitchen and peeped through the window. He then saw the plaintiff approaching from a passage between the house and the plaintiff's shack.

The plaintiff was walking towards the toilet. Shots rang out and the plaintiff fell to the ground. He informed Simphiwe that his brother had been shot and the two of them went outside. Simphiwe picked the plaintiff up and carried him to the lawn, and thereafter he and Simphiwe went to look for help.

[35] The witness identified the plaintiff's shack, Simphiwe's house with the window that he was looking out of, and the toilet, and the place where the plaintiff fell on the photographs. He testified that the police officers that shot at the plaintiff stood on a neighbouring stand on the other side of a fence where a wall had since been erected. There were four EMPD police officers pointing shotguns towards the plaintiff at the time.

[36] This evidence must be compared with the allegation in the particulars of claim that the plaintiff was shot by police officers who were in the street outside rather than on a neighbouring property.

[37] Mr Mojatladi was able to differentiate between SAPS officers and EMPD officers. The SAPS officers wore blue while the EMPD officers were wearing light brown trousers. He was also able to identify the shotguns carried by the officers and the Nyala armoured vehicle like the one that he had seen driving across the open field.

He identified himself on a photograph walking next to Simphiwe who is shown carrying the plaintiff on his back. He said that this photograph was taken when they were walking towards a vehicle that was going to take the plaintiff to hospital.

Mr DSL (Dave) Pieterse

[38] The plaintiff called Mr Dave Pieterse as an expert in forensic science. His expertise in the field in which he gave his evidence was not disputed. He was formerly employed by the ballistics section of the South African Police Service as a firearm and tool marks examiner. He joined The Forensic Hub as an independent forensic specialist in 2018 and has examined more than 6,500 firearm and tool mark-related cases. He is often called upon to testify courts in South Africa and in

neighbouring countries. His academic qualifications include a National Diploma in Policing from Technikon SA in 1997 and various qualifications obtained between 1997 and 2018. He has presented various training courses.

[39] He was instructed by the plaintiff's attorneys to carry out a forensic investigation and to provide an expert opinion regarding the incident that gave rise to the plaintiff's claim. To this end he attended at the plaintiff's home and the site was pointed out to him. He also interviewed the plaintiff and testified that the injuries he observed were consistent with the injuries that might be suffered by a victim shot at close range with a 12 gauge shot gun cartridge containing one or two rubber bullets. He quite rightly qualified his evidence in this regard by saying that he was not a medical expert and could not testify on the medical aspects of the injury and the claim. He relied on medical reports provided to him for the inference that the plaintiff had been shot with a rubber bullet.

[40] He studied various documents and photographs provided to him. Referring to the photographs he identified the plaintiff being carried on his brother's back with a wound visible on the left temporal area of his head. He also identified the 12 gauge pump action shotguns carried by police officers on the photographs and said that the ammunition visible on the photographs were 12 gauge calibre rounds with rubber bullets. He knew from experience that the SAPD and EMPD officers were usually issued with different colour but otherwise identical cartridges.

[41] The use of rubber bullets originated in Northern Ireland during The Troubles and were used by British forces to quell protests. They were now used worldwide.

[42] Rubber bullets are often described as non-lethal or less than lethal but scientific research debunked those descriptions. In theory the rubber bullets were designed to limit their ability to penetrate skin but experiments show that these rubber bullets are capable of penetrating the skull. He referred to a study that he endorsed where it was found that in an examination of 1,984 injuries, there were 300 permanent disabilities and these occurred especially when the bullet struck the head or the neck. 53 people or 3% of those struck died from rubber bullet related injuries. The

two biggest shortcomings of rubber bullets are their power and inaccuracy – as the stopping power and thus the ability to cause serious injury declined over distance, so did the accuracy. When fired at close range they were as lethal as bullets made from harder materials. They can cause both blunt and penetrative injuries. Even when they don't penetrate the skin the bullets can still cause bruising of organs. Heart attacks or collapsing lungs are possible outcomes.

[43] The guidelines published by the Geneva Human Rights Platform recommend that rubber bullets be directed at the lower body. The guidelines caution against “skip firing” or shooting at the ground so that the bullet would lose energy when it bounced upwards towards its target. This is a dangerous practice as the path of the bullet becomes even more unpredictable.

[44] The witness tested his analysis of the scientific authorities by shooting two 12 gauge rounds each containing two rubber bullets (of slightly different specification not important for present purposes) at the skull of a pig. The skull of a pig is not dissimilar to the skull of a human being and therefore useful when carrying out forensic tests. He fired from a distance of 5 m because his instructions were that the shooter was approximately 4.3 m away from the plaintiff when the shot was fired. The photographs clearly show how rubber bullets penetrated through the bony structure of the skull.

[45] The witness also drew a sketch plan of the scene showing the plaintiff's shack, Simphiwe's house, and the toilet referred to in the evidence. He identified a number of photographs showing the three outbuildings and the place where the plaintiff fell after being shot.

[46] Based on his investigations, the documents provided to him, and the injuries sustained by the plaintiff Mr Pieterse concluded that the injuries were most probably caused by a 12 gauge calibre cartridge containing two rubber balls. The severity of the injury was caused by the close distance at which the shot was fired and because the bullet travelled directly from the shotgun to the target. He makes the inference that the shot must have been fired from close distance as a rubber bullets fired from

a larger distance would not cause the same severity of injury. The injury would also likely be less severe if the bullet “skipped” or was deflected from some other object because in both these instances the bullet would lose some of its momentum.

[47] He made it clear however that he did not wish to encroach on the field of medically trained people and that of human anatomy. The concession was a proper one. In *Nicholson v Road Accident Fund*<sup>1</sup> Wepener J referred to various authorities and said:

*“[3] ... It is the function of the court to base its inferences and conclusions on all the facts placed before it. In S v Harris 1965 (2) SA 340 (A) at page 365B-C it was said:*

*“In the ultimate analysis, the crucial issue of appellant’s criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the Court itself. In determining that issue the Court – initially, the trial Court; and, on appeal, this Court – must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of appellant as a witness and the nature of his proved actions throughout the relevant period.”*

*And in S v Gouws 1967 (4) SA 527 (EC) 528D Kotze J (as he then was) said:*

*“The prime function of an expert seems to me to be to guide the court to a correct decision on questions found within his specialised field. His own decision should not, however, displace that of the tribunal which has to determine the issue to tried.”*

*The tendency to lead expert witnesses to attempt to influence a court with their “opinions” of the very issue which is to be determined, makes it difficult for courts to distinguish facts from inferences and opinions. However, difficult it may be, I am called upon to sift through all the evidence and to place all admissible evidence on the scales and consider them. Inadmissible evidence, transgressing the rules regarding the admissibility of evidence of experts, will be disregarded.*

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<sup>1</sup> *Nicholson v Road Accident Fund* [2012] ZAGPJHC 137 para 4.

[4] *The further difficulty which I have to struggle with is the absence of the factual basis on which some of the experts based their opinions. In this regard I agree with Meyer AJ (as he then was) in Mathebula v RAF (05967/05) [2006] ZAGPHC 261 (8 November 2006) at para [13]:*

*“An expert is not entitled, any more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence. (See: Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH, 1976 (3) SA 352 (A) at p 371G; Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd 1993 (2) SA 307 (A) at p 315E; Lornadawn Investments (Pty) Ltd v Minister van Landbou 1977 (3) SA 618 (T) at p 623; and Holtzhauzen v Roodt 1997 (4) SA 766 (W) at 772I).”*

[48] Mr Pieterse did not attempt to, and would not have been qualified to give evidence of a medical nature.

#### The close of the plaintiff's case and the case for the first defendant

[49] At the close of the plaintiff's case the first defendant's counsel intimated that she intended to call a witness not previously identified, namely the plaintiff's mother. It was agreed between the parties that the second defendant would lead its witnesses first.

[50] It transpired eventually that the first defendant did not lead to the evidence of the plaintiff's mother. This decision was conveyed to the Court at 10h00 on 7 March 2024 and the first defendant tendered the wasted costs for the appearance on that day.

[51] The first defendant adopted a passive role in the litigation and elected not to call any witnesses. When the matter was postponed for the filing of heads of

argument and for argument to 15 March 2024 the plaintiff also elected not to present any argument and not to file heads.

Heads were received a few days after the 15<sup>th</sup> but there was of course no opportunity for the first defendant to present oral argument nor for the plaintiff to respond to these heads filed out of time. I have therefore not considered the first defendant's heads.

#### The second defendant's witnesses

[52] The second defendant called two witnesses. They were Chief Superintendent Bheki Nhlapho who was a superintendent in the SWAT (Special Weapons and Tactics) unit of the second defendant on duty in Palm Ridge on 12 October 2009 and Mr Robert Shultz, a former employee of the second defendant who was an inspector in the SWAT unit in October 2009. Chief Superintendent Nhlapho was the senior EMPD officer on the day and was in charge of the EMPD force. In 2009 he had more than 10 years' experience. Inspector Shultz was his second in command.

[53] Both witnesses testified that the EMPD police officers were in Palm Ridge on the day and they were there to quell a violent protest on the main road that runs through Palm Ridge. As already pointed out this road is about one km from the house where the plaintiff lived. The police were on hand to deal with violent protesters, to clear the main road from obstruction as various rocks and stones had been placed across the road to obstruct traffic, and to protect the members of the public who were using the road or who lived on the main road.

[54] This involved protecting the members of the public from physical harm and also protecting their motor vehicles, houses and other property, and making it possible for them to use the main road to go about their business.

[55] They both testified that they and the officers under their command would have no reason to shoot at an innocent member of the public a considerable distance from the protest and similarly no reason to stray so far from the main road where the events of the day unfolded.

[56] The EMPD officers arrived very early that morning, at about four o' clock, having been forewarned of protest action planned for the day. Their numbers grew during the course of the day from about 15 to about 70 officers. They were armed with 12 gauge shotguns and 20 rubber cartridges each. During the day some officers run out of ammunition and stocks were replenished by the armoury. The officers were threatened by a large number of people wielding sticks, assegai, clubs, iron bars, and handheld catapults. The catapults were used to shoot projectiles and many members of the crowd threw stones at the police officers. Protesters also carried corrugated iron sheets to use as shields.

[57] The protesters had also blocked and barricaded the main road to prevent traffic from flowing. The task of the police officers were to push the protesters back, to protect the public, to maintain the peace, and to clear the area for traffic. Many members of the crowd were very aggressive.

[58] The police were active on the main road and at the intersections with side roads where protesters would on occasion gather when driven back, in order to regroup and threaten the police again.

[59] Under these circumstances it is important for police officers to function as a group and to avoid becoming isolated as one or two or a few policeman isolated from the main police force could face extreme danger from an antagonistic crowd. The work is physically demanding and while some officers would be at the coalface as it were dealing with protesters others would fall back in order to rest, but they would fall back behind the active officers so as to ensure their safety and to be available if called upon. Under these circumstances the police officers are always vastly outnumbered and have to rely on the discipline and their proven strategies. In this context the chief superintendent testified that officers received training in crowd control but had to concede that not all officers at a given scene have necessarily received all the training that is desirable.

[60] While it is the purpose of the police officers to maintain peace and protect



property, the use of excessive violence or aggression by police officers can never be countenanced in a constitutional state. There is simply no justification for unnecessary acts of violence and the police are expected by society to behave impeccably and with discipline even when under threat or when taunted by a belligerent crowd of protestors.

At the same time police officers cannot be blamed when attacked by a crowd of people especially a large crowd that outnumber the police officers from defending themselves and to use such reasonable force as is justified. An armchair approach must also be avoided and the views of the officer in charge and what was required at the time must be given due weight. He was after all on the scene and could bring his expertise and experience to bear on the situation. This does not mean that his decision is substituted for the decision of the court or is accepted blindly, only that the court is entitled to give due regard to the decision taken by an experienced officer on the ground in forming its own conclusions.

[61] There is no evidence before the court to suggest that the police officers abused their powers and their firearms on the day in question. They did shoot rubber bullets at protesters but it is not possible to infer from the evidence and particularly the photographs placed before the court that they shot point blank at protesters from close range.

The evidence was in fact the opposite, in that police officers prefer to maintain a safe distance between themselves and the protesters in order to be able to use their shotguns to best effect and to avoid stones and other objects thrown at them. Mr Robert Shultz testified that in his experience as a police officer doing duty at riots and protests it is safer to keep a reasonable distance than it is to go right up to the antagonistic crowd, thus provoking a violent reaction.

[62] There is a debate about whether it is good practice to fire into the ground and hope that the rubber bullet would ricochet in the right direction as it is not possible to accurately predict the path of the bullet under such circumstances. It is however advisable to shoot low rather than high.

[63] The SAPS officers were not there at the start of the day but they arrived and

are also brought vehicles onto the scene, such as the Nyala vehicles shown on the photographs. These vehicles are described as “*hard shell vehicles*” as they are built to withstand a considerable amount of abuse from rioters without endangering police officers in the vehicle.

#### The plaintiff's failure to call medical witnesses

[64] The plaintiff's legal team elected not to present any medical evidence as to the cause and effect of the plaintiff's injuries despite the agreement that the parties would not rely on any affidavits and would only rely on documents referred to by witnesses during oral evidence. No explanation was provided for the failure to lead medical evidence. During argument plaintiff's counsel submitted that the inference that the plaintiff was shot with a 12 gauge round containing two rubber bullets must be made from the other evidence. In the absence of medical evidence the inference cannot be made as an injury such as that suffered by the plaintiff could also be caused by a projectile such as a stone or something shot by a catapult.

[65] Counsel for the plaintiff also argued that the medical records are indeed before the court and maybe taken into account because of an affidavit that accompanied the medical records and was deposed to in terms of the Criminal Procedure Act 51 of 1977. He did not refer to any authority in support of this submission. Had it been the intention to so use the medical records it would have been a matter for discussion at a pre-trial conference where the parties agreed not to rely on affidavits.

[66] In the absence of medical evidence it is in my view not possible to find what caused the plaintiff's injuries and a court cannot find that because something is possible, it is also preponderantly probable. The plaintiff was possibly injured by a rubber bullet fired by a police officer during the protests on 12 October 2009 but this possibility cannot be elevated to a probability nor is it possible to find that the plaintiff was injured when he was shot in his yard.

#### The plaintiff's failure to call relevant factual witnesses

[67] it is understandable that the plaintiff himself was not called to testify as according to the evidence by the curator it is not possible for him to do so. There are however a number of other witnesses who could have been called and no basis was laid for the decision not to call them.

[68] The plaintiff failed to call the plaintiff's mother, his father, his brother Simphiwe Motaung, his brother's girlfriend Lindiwe, Daiza who according to a statement by Mr Majatladi in 2022 were in the room with him when the plaintiff was shot outside, or any other friends of Simphiwe who were in the room playing cards with Simphiwe when the shooting occurred, as witnesses. This decision was made despite the fact that the very question that had to be answered was whether the plaintiff had been shot and also whether he had been shot in the yard of the property walking between his shack and the outside toilet. The plaintiff elected to rely entirely on the evidence of Mr Majatladi on these two most crucial aspects of the case.

[69] In respect of the plaintiff's mother it is of particular importance because in an affidavit deposed to by the plaintiff's mother she stated under oath that she found her son not outside in the yard outside the toilet or on the lawn in front of the house as testified by the two other witnesses called by the plaintiff on the events of the day, but inside "*the shack*." It is not clear whether this is reference to the shack where the plaintiff lived or to Simphiwe's house. This is a glaring contradiction that remains explained, and evidence by the plaintiff's mother might have thrown light on the matter.

[70] In terms of the agreement reached at the pre-trial conference it is common cause that the document is indeed an affidavit deposed to by the plaintiff's mother without admitting the correctness of contents. It is therefore common cause that she stated under oath that she found her injured son indoors.

[71] There is of course no principle or rule of practice that all available witnesses must always be called. The correct course of action depends on all the circumstances. The failure to call a witness who is available and able to testify to the facts on a disputed issue (and I stress the underlined phrase) merits the inference

that the party fears that the evidence will expose facts unfavourable to that party. But this is true only when the evidence is available and when it would indeed elucidate the facts. The question whether an adverse inference is to be drawn from the failure to call a witness is a question of fact.<sup>2</sup> In this matter I conclude that an adverse inference is justified.

### Onus

[72] For the plaintiff to succeed the probabilities must be substantially in his favour, in other words he must prove his case on a preponderance or a balance of probabilities.<sup>3</sup> I must be satisfied that sufficient reliance can be placed on the plaintiff's version *"for there are a to exist a strong probability that his version is the true one."*<sup>4</sup>

[73] When a court is faced with two mutually destructive versions such as, in this case, one version where the police officers shot at the plaintiff at close range while he was in his yard and they were in a neighbouring yard (or in the street outside) in an unprovoked attack and a second version where the police were engaged in crowd control and facing protesters on the main road a kilometre away, the plaintiff is expected to satisfy *"the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore falls or mistaken and falls to be rejected."*<sup>5</sup>

In considering the probabilities the credibility of the witnesses is bound up with the probabilities and credibility should not be considered independently or separately from the probabilities.

[74] The second defendant's witnesses made a good impression. Any inference that they would use or did use unnecessary violence to quell the riot on the day is in my view not justified on the evidence. They appear to be well trained and in control of

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<sup>2</sup> *Elgin Fireclays Limited v Webb* 1947 (4) SA 744 (A) 749 to 750; *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A). See also *Olifant v Shield Insurance Co* 1980 (1) SA 903 (C) and *Hal obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA).

<sup>3</sup> *De Wet v Adams* 1935 TPD 247; *Eversmeyer v Walker* 1963 (3) SA 384 (T); *Blyth v Van den Heever* 1980 (1) SA 191 (A); *MVA Fund v Dubuzane* 1984 (1) SA 700 (A).

<sup>4</sup> *Maitland and Kensington Bus Co v Jennings* 1940 CPD 488 at 492.

<sup>5</sup> *National Employers' General Insurance Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) 440E-L.

their emotions as senior officers entrusted with the very difficult task of maintaining peace under the circumstances as described by them and not disputed by the plaintiff's counsel. Neither of them could testify that they knew where each and every police officer was at every moment during the day, but they did testify that the officers were under their control and operating as a group on the main road and at the intersections facing onto the main road. They also testified that under these circumstances the EMPD officers would defer to the SAPS officers but that the two groups worked together in that the SAPS officers would provide the use of the hard shell vehicles and liaise at all times with the EMPD officers.

[75] It is not the case for the plaintiff that he participated in or was in any way associated with the protests and that police officers then used excessive force of which he was the victim. I find that I can accept the evidence by the two police officers that the police officers that were on duty during the riots in Palm Ridge were at all times and the main road where the protests took place or immediately next to the main road and the side streets intersecting with the main road.

[76] Unlike the evidence by the two police officers I do not find the evidence by or the demeanour of Mr Majatladi convincing. On his evidence he was running away from approaching police officers and ran to Simphiwe's house where he observed the assault on the plaintiff from inside the house while Simphiwe and others were close by but not interested in the furore that he described outside. He is shown on photographs walking next to the plaintiff's brother who was carrying the plaintiff in a street where rocks and obstacles had been placed, but on his evidence the riots were a kilometre away and rioters only came towards the house where was hiding when the police officers fired their weapons. I do take into account that he was not cross – examined on the obstacles on the road, but it is not possible to reconcile the presence of these obstacles with the area immediately around the plaintiff's house from where he was apparently taken to hospital on the evidence of the plaintiff's witnesses.

[77] The plaintiff's other witness on the facts, Ms Khethabahle, was thirteen years old when the incident occurred and on her evidence she only saw the plaintiff outside

the house after he had been injured.

[78] The failure to lead medical evidence and the factual evidence of the other individuals also impact on the probabilities.

[79] I therefore found that on the evidence before me

79.1 that there were no police officers either on the street in front of the plaintiff's dwelling or and the neighbouring yard approximately one kilometre away from the protest action;

79.2 that there would be no reason for the police officers to go to the vicinity of the plaintiff's yard one km away and then to shoot at an innocent bystander who did not provoke the police officers;

79.3 that the police officers worked as a group under the command of the chief superintendent and that the SAPS officers and the EMPD officers liaised and worked together;

79.4 that the police officers were engaged on the main road where they confronted protesters and where shots were indeed fired at protesters who also launched projectiles as part of the protest;

### Conclusion

[80] The plaintiff failed to prove its claim on a balance of probabilities and the claim stands to be dismissed.

[81] I am of the view that this is not a case in which the usual cost order of costs following the result should be made. The plaintiff himself seem to have had no input in the litigation or in the way in which the litigation was dealt with by his legal team and his curator because of his medical condition. He is also indigent. No case is made out for costs against any other party.

[82] For all the reasons as set out above I make the order in paragraph 1.

**J MOORCROFT**

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION  
JOHANNESBURG**

***Electronically submitted***

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **25 April 2024**

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| DATE OF TRIAL:                  | 4, 5, 6, 7 & 15 MARCH |
|                                 | 2024                  |
| DATE OF JUDGMENT:               | 25 APRIL 2024         |