

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case number: 2019/519

Date of hearing: 5, 6 August 2024 and 18
September 2024

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
7/10/24	[Redacted Signature]
DATE	SIGNATURE

In the matter between:

JOBE MADIDA MAKAMU

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

**THE NATIONAL COMMISSIONER:
SOUTH AFRICAN POLICE SERVICES**

Second Defendant

**THE GAUTENG PROVINCIAL COMMISSIONER
SOUTH AFRICAN POLICE SERVICES**

Third Defendant

JUDGMENT

SWANEPOEL J:

[1] The plaintiff claims damages pursuant to an incident that occurred on 4 July 2018 at Germiston, when a member of the South African Police Services first shot, and then arrested the plaintiff on charges of attempted common robbery of a firearm.

[2] The parties agreed to separate the merits of the matter from quantum, and I am asked to determine the former only.

[3] Plaintiff claims that he was unlawfully shot, arrested and then detained at the Germiston police station from 4 July 2018 until 5 July 2018, when the State refused to prosecute his case, and he was released from custody.

[4] It is common cause that at approximately 08h00 on 4 July 2018 the plaintiff and his brother were walking to work in the Georgetown area of Germiston. Warrant Officer Kgatla ("W/O Kgatla"), a member of the Police Services, and Warrant Officer Mavhungo ("W/O Mavhungo") were busy conducting crime prevention operations. The operations entailed them driving around in a marked police vehicle, stopping people at random, and searching them. Apparently, persons carrying school satchels particularly attracted their attention because they had previous experience of firearms being concealed in such bags.

[5] Questionable as this operation is, the search, which was in my view unlawful, is not relevant to these proceedings. What is relevant is that the plaintiff and his brother, Kastigo Makamu attracted the police's attention. They stopped and approached the plaintiff and his brother. It is at this point that the versions differ. The plaintiff says that W/O Kgatla

alighted from the vehicle, approached him and greeted him. He asked where they were going, and upon learning that they were going to work, they were interrogated about where they worked. The police asked for their identity documents and passports, which they could not produce. The plaintiff explained to W/O Kgatla that he had attended his entire school career in South Africa, and that his father had possessed a South African identity document.

[6] The police demanded to inspect their cellular telephones. On the plaintiff's brother's telephone they discovered a contact by the name of "Armando". The police apparently considered this to be the name of a Mozambican citizen and they asked why the plaintiff and his brother had contact with Mozambican citizens. The police became irate. When the plaintiff asked for the telephone to be returned, the police refused to do so. W/O Mavhungo threw the telephone into the police van, and as the plaintiff reached for the telephone, W/O Kgatla started assaulting him. W/O Mavhungo took out pepper spray and tried to spray plaintiff's brother. The latter ran away with W/O Mavhungo in pursuit.

[7] W/O Kgatla tried to push the plaintiff into the van. The plaintiff then told him that he did not believe that they were police officers, considering how they were acting, and he refused to get into the van. W/O Kgatla drew his firearm, threatened to shoot the plaintiff, and then fired one shot into the plaintiff's left leg. The plaintiff's brother came running back accompanied by W/O Mavhungo. An ambulance was called and the plaintiff was taken to Tembisa hospital. He was discharged on the same day and was then detained at the Germiston police station.

[8] In cross-examination the plaintiff said that the police wanted to take the plaintiff and his brother to the Department of Home Affairs, because they were suspected of being illegally in the country. The version put to the plaintiff on behalf of the defendant was to the effect that the police had identified themselves by showing their identity cards. They then started speaking to the plaintiff and his brother at which point the

plaintiff handed his satchel to his brother, who ran away whilst being pursued by W/O Mavhungo. The plaintiff refused to enter the van to be taken to Home Affairs and he pushed W/O Kgatla, causing him to fall against a barrier. The plaintiff then allegedly jumped on him, managed to wrest his firearm from him, leading to a struggle for the firearm. It was said to be during the struggle that the firearm discharged itself. It was put to the plaintiff that he had tried to rob W/O Kgatla of his firearm, and that W/O Kgatla had acted in self-defence when the shot was fired. The self-defence proposition and the accidental shooting proposition are clearly at odds with one another. One cannot act in self-defence by accident.

[9] The plaintiff's brother, Mr. Kastigo Makamu gave much the same evidence as the plaintiff. He says that he struggled with W/O Mavhungo when the latter tried to pepper spray him. They were around the corner from the plaintiff when they heard the shot, and W/O Mavhungo released him and returned to the original scene. Mr. Makamu also returned to the scene. He admitted to carrying a satchel, but denied that the plaintiff had handed him the bag, nor that he had tried to run away.

[10] Warrant W/O Mavhungo testified that during their patrol he and W/O Kgatla searched for suspicious looking persons, whom they would then search. They were particularly on the lookout for persons carrying school satchels. He says that as they stopped to search the plaintiff and his brother the plaintiff threw the bag to his brother who then ran away with the bag. W/O Mavhungo ran after him but he could not catch him. When plaintiff's brother eluded W/O Mavhungo, he returned to the scene. He evidently never heard a shot being fired, but on his return he found the plaintiff injured and in the police van. W/O Mavhungo denied that they ever introduced themselves to the plaintiff and his brother, because, he says, as soon as they stopped, plaintiff's brother ran away with the bag.

[11] In answer to the Court's question W/O Mavhungo said that after the shooting he again saw the plaintiff's brother, but he was no longer in possession of the bag.

[12] Sergeant Moses Shibambu testified that he worked in the crime office and that he received the new case dockets. His evidence took the matter no further.

[13] I had been told before the commencement of the trial that the defendant's witnesses were available to testify. That turned out to be untrue, to the knowledge of the defendant's counsel. W/O Kgatla was apparently in hospital and unable to testify. I find it objectionable that counsel, who is supposed to be an officer of Court and who is expected to act as such, misled me before the trial even commenced. Unfortunately, the defendant was unable, due to W/O Kgatla's absence, to complete the leading of evidence, and reluctantly I postponed the matter.

[14] On the postponement date W/O Kgatla testified that he and W/O Mavhungo observed the plaintiff and his brother and they decided to search them. As they approached the plaintiff and his brother the plaintiff threw a bag at his brother, who ran away with the bag. He specifically testified that even before he could request to search the plaintiff, the latter grabbed him by the clothing and pushed him against a barrier. The plaintiff then stood over him and he took take the firearm from its holster. At that point the plaintiff was in possession of the firearm. W/O Kgatla managed to grab the plaintiff's hand and they wrestled for the firearm. This caused a round to be discharged. W/O Kgatla explained that he always left one round in the barrel of the firearm.

[15] The plaintiff evidently weakened as a result of having been shot, allowing W/O Kgatla to overpower him and to take the firearm back. When W/O Kgatla realized that the plaintiff had been injured, he called for an ambulance.

[16] In cross-examination W/O Kgatla said that although he had taken out his identity card, before he could even show it to the plaintiff the struggle ensued. W/O Kgatla had deposed to an affidavit in support of the

criminal charge for which the plaintiff was detained. In the affidavit he said the following:

"When at corner Rand Road and Voortrekker Street in Germiston at about 08h00 I saw suspicious two African males and I ordered W/O Mavhungo to stop the car so that we can search those two suspicious African males and he stopped the car and I approach to one of the two and identified myself to him by showing him my police card even though I was dressed in full uniform and politely request to him to be searched.

When I was about to search him he physically push me against the wall and grabbed me by my jacket while his other hand grabbed my firearm and we both struggled on the firearm with our hands and during the commotion the bullet went off and hit him on his right foot." (sic)

[17] When W/O Kgatla was confronted with the contradictions between his evidence and the affidavit he said that he had introduced himself to the plaintiff and had asked to search him. He directly contradicted his evidence in chief. When he was confronted with the fact that the affidavit did not disclose that the firearm had been taken from him, he explained that when he deposed to the affidavit he was in shock. He also admitted having failed to say in the affidavit that he had fallen down as a result of the plaintiff grabbing him.

[18] The two versions presented by W/O Kgatla are incompatible with one another. The question is whether the incompatibility justifies a finding that W/O Kgatla's evidence must be rejected. W/O Kgatla's explanation, that he was in shock when he deposed to the affidavit, is self-serving. I do not believe that a police officer with 29 years' experience, having inflicted a minor wound on a suspect, would be so traumatized a few hours later as to present completely different facts as to what had actually occurred. The only conclusion that I can come to is that W/O Kgatla and Mavhunga are not being truthful.

[19] It was never disputed by the defendant's counsel in cross-examination that the plaintiff's brother returned to the scene once he heard the shot. A question that remains unanswered is why, if the police officers had suspected him of having a firearm in the bag when he ran from the scene, did they not conduct further investigations as to the whereabouts of the bag. Why did they not confront the plaintiff's brother and ask him where the bag had been left. W/O Mavhungo says he did not search for the bag. If there really was concern about a possible firearm being in the bag, why did the police not conduct a search for the suspected firearm?

[20] On the other hand, the plaintiff and his brother impressed as witnesses. The plaintiff's warning statement that was taken on the same day as the incident mirrors his evidence in court. The plaintiff and his brother's versions were never seriously placed in doubt. They answered directly and, in my view, honestly.

[21] On the probabilities, it is doubtful that, having only seen the police alight from their vehicle, without any further communication having occurred, and without them knowing what the police officers intended to do, the plaintiff would attack W/O Kgatla, and his brother would simply flee.

[22] I conclude therefore that the plaintiff's version is to be preferred on the probabilities. I find that the shooting of the plaintiff, and his subsequent arrest and detention was unlawful.

[23] I therefore make the following order:

[23.1] The first and second defendants are liable, jointly and severally, for payment of the plaintiff's agreed or proven damages resulting from the unlawful shooting, arrest and detention of the plaintiff on 4 July 2018.

[23.2] The first and second defendants shall pay the costs of the action to date jointly and severally, including the costs of counsel on Scale B.



**SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION ,PRETORIA**

Counsel for the plaintiff:	Adv. M C Mavunda
Instructed by:	M A Okafor
Counsel for respondent:	Adv. S Mbhalati
Instructed by:	The State Attorney
Date heard:	5 and 6 August 2024 and 18 September 2024
Date of judgment:	7 October 2024