

REPUBLIC OF SOUTH AFRICA

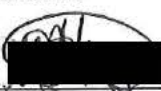


**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 74946/2019

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

DATE: 22/05/2025


SIGNATURE

In the matter between:

NELSON MBOMBI

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGMENT

Mzuzu AJ

Introduction

[1] This is an action for delictual claim. The plaintiff claims against the defendant a sum of R3 669 146.00. The claim arises out of a shooting incident that happened in Mooiplaas, Pretoria, Gauteng on 01 July 2017, where the plaintiff sustained a bullet wound to the left foot¹.

[2] The plaintiff alleges that he was assaulted by the police officials of South African Police Services in the employ of the defendant, whose ranks and names are unknown to him. The plaintiff alleges that the members of South African Police, acting within the scope of their employment by the defendant, assaulted him by shooting him on his left foot with a gun using live ammunition².

[3] The plaintiff alleges that the assault took place in the public domain and within sight of members of the public.

[4] The defendant defends the action and avers that the plaintiff was shot at in circumstances where he was part of a group of males that attacked the police officials. It is alleged that one of the members of the crowd pelted one of the police officials with an unknown object on his face³.

[5] The defendant avers further that it was necessary for the police official to fire a warning shot by directing it into the ground with the intention of dispersing the crowd so as to be able to find an avenue to escape, alternatively to defend himself and his colleague⁴.

¹ CaseLines, page 002-6 paragraph 4

² CaseLines page 002-6 para 4.2

³ CaseLines 002-20 para 3.7 to 3.8 of the amended plea

⁴ CaseLines 002-20 para 3.9 of the amended plea

[6] The defendant contended further in his defence that the plaintiff, by being amongst the crowd that attacked the police officials, voluntarily placed himself at risk of being shot by the police officials and to this end the defendant raises the defence of *volenti non fit iniuria*⁵.

[7] The matter proceeded on both merits and quantum.

Facts

[8] The following facts appear to be common cause facts as per the pleadings and minutes of the pre-trial conference:

8.1. that the plaintiff is a major male and has legal capacity to institute claim as well as his ID number;

8.2. that the plaintiff has *locus standi* to claim damages;

8.3. the date, time and place of the incident;

8.4. that the police officers acted within the course and scope of their employment on the day of the incident;

8.5. that the plaintiff was shot in the public domain within sight of members of the public;

8.6. that the court has jurisdiction to hear the matter;

8.7. that the plaintiff has appointed expert witnesses and they have compiled medico-legal reports which have been filed on record on 23 July 2021.

8.8. that the defendant has appointed all his expert witnesses and they have compiled medico-legal reports which has been filed on record on 20 January 2023.

⁵ CaseLine 002-20 paras 3.10 to 3.11 (including its sub-paragraphs) of the amended plea.

8.9. that the plaintiff and defendant admit that the parties' reports can be used as evidence, but do not agree on the contents.

8.10. that the plaintiff's non-compliance with section 3(2) of Act 20 of 2002 has been condoned by the virtue of a court order dated 15 March 2021.

Facts in dispute

[9] The following facts appear to be in dispute as per the pleadings;

9.1. Assault: They plead that the assault was justified as private defence and by *volenti non fit injuria*.

9.2. Injuries emanating from the assault: the defendant dispute that the plaintiff suffered the injuries as outlined in the respective expert reports.

9.3. Sequelae of the injuries: the defendant does not admit that the plaintiff suffered sequelae as a result of the psychological effect of the incident. The defendant dispute that the plaintiff suffered damages as a result of the incident.

9.4. Damages suffered: the defendant dispute that the plaintiff suffered damages as a result of the incident.

Issues for determination

[10] The parties agreed that the issues for determination are as follows:

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

10.1 Should the court find that the defendant unlawfully and wrongfully shot the plaintiff, whether the shooting was in self-defence and whether the plaintiff has suffered general damages and special damages as a result of the shooting?

Plaintiff's case in summary

[11] On 1 July 2017 at about 21h15, while on the road from his place of residence in Mooiplaas in the company of three of his friends, walking towards a place where there was an event, they were approached by the uniformed police who were in a marked police van and stopped them. Plaintiff and his friends were in possession of sealed alcohol and those unknown members of SAPS, without introducing themselves confiscated their liquor.

[12] After not a very long time the police came back, stopped their vehicle and started firing shots. They fired the first shot and he did not run because he believed they had done anything wrong, advised his friends not to run too. The second shot was fired and that is when they realized that the situation was getting serious and they could be killed and they (plaintiff and his friends) started to run away.

[13] They ran to different directions and whilst they were running in the middle of the sports ground he felt like something sharp pierced his left feet. He continued running until he got to a place where there was a tree and rested as he was feeling like he was losing strength.

[14] A passer-by member of the community approached him and asked what happened, realizing that he was bleeding and that he has been shot. Members of the community also came. An ambulance was called. He was eventually taken to Kalafong Hospital where he was admitted, received treatment and was discharged after two weeks. He testified that the bullet struck him underneath his feet.

[15] During the incident he had pains and still in pain and during cold whether he also feels pain. He used to play soccer and walk a long distance as a form of exercise but post the injury he can no longer do those things.

Witness testimony of Mr. Prince Makhubele

[16] Mr. Makhubele testified that on the day of the incident they were on their way to a certain place where there was an event, as they were walking two police officials approached them, stopped and took their sealed beers. They then drove away. They then continued to walk through the ground/sports field. Whilst walking, the police official then turned around, came back towards them and started firing shots at them.

[17] It was the driver that was shooting. They then ran away in different directions after the first shot. After a while someone informed the witness that the plaintiff was shot.

[18] Under cross-examination, he stated that there are no light or Apollo light that was working at the time of the incident. He claimed that he does not remember if the plaintiff informed them not to move or run away because they did not do anything.

[19] He claimed that when the police approached them after initiating a U-turn, the police van would have been on the side and could not have been on the back.

[20] He claimed that the normal circumstances when a person hears a gunshot he would move because he would not know what was going on but at that time, it was only them and no other people around. He claimed that it was a must that they must run away because a firearm is dangerous. He claimed that during that incident he does not remember what could have happened because it was a long time ago.

Defendant's case in summary

[21] The defendant testified through its first witness, Mr Sakiel Mampheko, in summary as follows:

[22] He is employed by the South African Police Services as a Constable and that he is stationed at Mooiplaas.

[23] He testified that he is a member of the SAPS with 15 years' experience. The incident occurred on or about 1 July 2017 at about 21:30. At the time of the incident he was a Constable by rank and his role were crime prevention, attending to complaints and patrol.

[24] He is responsible for several areas and Mooiplaas is one of the areas he is responsible for. Mooiplaas is an informal settlement area with high crime rate, therefore it requires regular patrolling, as they were patrolling, they saw three males on the road in possession of liquor. He stopped the police motor vehicle and approached them. Two of them ran away.

[25] He proceeded to introduce himself and requested permission to search as it is the police standard operating procedure. Nothing was found on the person. However there was liquor next on the ground. Some liquor was still sealed and some of the liquor was opened. He proceeded to ask them as to who owns the liquor and they denied ownership. He proceeded to spill the opened liquor and the sealed ones he took them into the police motor vehicle to be booked at the police station for safe keeping.

[26] He then proceeded to drive away with his crew member however they had to make a U-turn as Mooiplaas area has a single point of entry and a single point of exit which is the same, as they were approaching the area where they confiscated the liquor, members of the community started throwing stones and/or objects at the police motor vehicle. At the time, the driver's window was opened. He got hit by an object on his face.

[27] There were members of the community that were blocking the road. He then stopped the police vehicle, both of them got out of the car. He then pulled out his service pistol, fired one warning shot to the ground which he considered as safe direction at the time and the people did not move.

[28] Because no-one moved, he then fired the second warning shot on to the ground to where he considered being a safe direction and still none of the people moved. Then he fired the third warning shot on to the ground which he still considered being a safe direction and that is when the people started to disperse or flee the scene.

[29] It was not possible to drive into the crowd because it would mean that he was going to bump them. Since he had been hit with an object on his face, Sergeant Kekana drove him to Unitas Hospital. According to him no injured person was left at the scene. There was no other way that he could have avoided firing warning shots at that time because the injury on him had already occurred and their lives were in danger.

[30] During cross-examination, he was asked how he accounts for ammunition and he indicated that the recordings are made in the occurrence book (OB). He further reiterated that Mooiplaas does not have lights to this day. He was referred to a pole in the picture and he indicated that the Apollo light is not working because the community stole cables immediately after installation.

[31] During cross-examination he indicated that after negotiating a U-turn he heard the bouncing of stones and objects before something struck him on his face. He stopped the vehicle when he could see that there was a group of people who had blocked the road.

[32] He explained that he fired a warning shot on the ground to the safe direction and people did not move, he fired another warning shot into the ground and still people did not move. The safe direction is a place where he would not injure people or cause death. He regarded direction to which the shot was fired as a safe direction, because he shot into the ground and not in a particular direction.

Witness testimony of Sekgweng Nathaniel Kekana

[33] The second witness for the defendant testified in summary as follows:

[34] He is employed by the South African Police Services. He is holding a rank of Sergeant for seven years. At the time of the incident he was holding a rank of Constable, responsible for visible policing and he was attending to complaints and patrol.

[35] He testified that Mooiplaas is a place without water services, without electricity, a dumping area, with one gravel road which is used as a point of entry and point of exit and an epicentre of crime especially at the end of the month.

[36] On the day and time of the incident, he was patrolling the area together with Sergeant Mampheko, who was the driver at the time. During patrolling, they identified three males who were in possession of and drinking liquor. There were, however, other people in the area of vicinity walking around as there was a tavern nearby. Sergeant Mampheko stopped the police motor vehicle and they both exited. As they were exiting the vehicle, two of the males that were spotted started to run away. He introduced himself to one male who was next to him, asked for consent to search him, consent was granted, he searched him, and nothing was found on him.

[37] He then went to Sergeant Mampheko's side and found liquor on the ground. Some were opened and some were still sealed. When the male individual was asked about the ownership of the liquor, it was denied. They spilled the liquor that was opened because it is not allowed to carry opened liquor in a police motor vehicle; they took the sealed liquor into the police motor vehicle to be recorded at the police station. After placing the sealed liquor in the police motor vehicle, both police officers got back into their police motor vehicle and drove away.

[38] Since Mooiplaas has one point of entry which is also used as a point of exit, they had to make a U-turn. As they were approaching the tavern which was on the left hand side of the police motor vehicle and the sport field was on the right side of the motor vehicle, they heard people's voice approaching who started attacking the police motor vehicle, throwing stones and unknown objects at them.

[39] At the time, Sergeant Mampheko's side window was opened, and he was hit by an unknown object on the face. Sergeant Mampheko stopped the police motor vehicle, when they saw a group of people approaching in front of the police motor vehicle and they both got out and hid behind the police motor vehicle doors.

[40] Sergeant Mampheko pulled out his firearm and fired the first warning shot to the ground which was a safe direction at the time. It was important at that time to fire a warning shot at the safe direction. No one moved or dispersed.

[41] He then operated a police radio by pressing emergency button to call for backup. The radio's emergency button activates an irritating sound to get attention of various police stations. As he was calling for backup, he was observing the area at the same time. He testified that he heard the first warning shot because he afterwards called for backup using emergency button on the radio that activated an irritating sound.

[42] The group of people dispersed after some point after warning shots were fired. He then drove the police motor vehicle from the scene and no person was left at the scene that was injured. From the scene the two police officers drove to Unitas Hospital to drop off Sergeant Mampheko.

[43] During cross-examination he defined a safe direction as a place where a shooter is shooting and no person can get injured or property can be damaged. According to him Constable Mampheko fired the warning shot at the safe direction. He asserted that at the time of the incident, it was impossible to drive through the ground or be able to shoot at the crowd but to the ground because there was a heap of rubble. It was not as it currently looks at the pictures as some of the rubble has been removed.

[44] After the first shot was fired, he called for backup whilst at the same time observing the area and that is why he was able to see the crowd of people that did not move after Sergeant Mampheko's first warning shot. He asserted that the warning shot fired by Sergeant Mampheko was out of necessity as their lives were already in danger. He further asserted that Sergeant Mampheko did not at any particular time aim at the Plaintiff when firing shot. All warning shots were fired to the ground as it was a safe direction at the time.

[45] He asserted that the crowd of people dispersed after some time after the third warning shot. He was the one driving from the scene as Constable Mampheko was injured and took him to Unitas hospital.

[46] He further asserted that he does not know how many bullets Sergeant Mampheko had at the beginning of their shift.

[47] During the re-examination he asserted that if one is already attacked and the attack was on-going that by firing a warning shot one would still be considerate of the people around or the crowd. It was necessary for them to shoot onto the ground so that the crowd could disperse. He further asserted that when the person who is shot was where the crowd was and that person started running, that person would not be considered an innocent bystander.

[48] He further asserted that the incident was reported at the police station and was also recorded in the Occurrence Book.

Quantum

[49] It is contended on behalf of the plaintiff that the plaintiff sustained 3 and 4 metatarsal fracture as a result of the shooting and therefore must be compensated for the damages he suffered as a result thereof.

[50] The injuries sustained by the plaintiff reduced his capacity to perform his pre-accident duties and therefore suffered future loss of earnings.

[51] The defendant does not agree that the plaintiff suffered the above injuries, and as a result of the said injuries his productivity capacity will be affected in the future.

Analysis of the evidence

[52] On the conspectus evidence it becomes clear that the parties' versions are mutually exclusive. This requires me to make findings as to which of the versions is probable under the circumstances.

[53] This requires that the court considers the evidence in its totality and decide where the probabilities rest. Ultimately the court will draw an inference from the available evidence looking at the probabilities. The rule in this regard is to the following effect (paraphrased by authors D T Zeffertt and A P Paizes)⁶ the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

[54] In civil matters the rule is, when there are two mutually distractive versions that are equally possible the court will select a version that is more plausible. In the matter of *Cooper and Another NNO v Merchant Trade Finance* ⁷ the Supreme Court of Appeal *per* Zulman JA stated the following:

“...the court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. In a criminal case, one of the ‘two cardinal rules of logic’ referred to by Watermeyer AJ in *R v Blom* is that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct. This rule is not applicable in a civil case. If the facts permit of more than one inference, the Court must select the most ‘plausible’ or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment. If on the other hand an inference in favour of both parties is equally possible, the litigant will not have discharged the onus of proof. Viljoen JA put the matter as follows in *AA Onderlinge Assuransie Assosiasie Bpk V De Beer*:

....

Selke J expressed the manner in *Govan v Skidmore* thus:

⁶ The South African Law of Evidence 2nd ed.p.100 at 202-203

⁷ *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) 1027 at para 7

‘...in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence 3rd ed Para 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one’. Holmes JA in *Ocean Accident and Guarantee Corporation Ltd v D Koch* explained that the understood ‘plausible’, in the context of the remarks of Selke J, to mean ‘acceptable, credible, suitable’.”

[55] The plaintiff testified that the defendant confiscated their alcohol without saying anything, and the defendant later came back and shot the plaintiff without any reason.

[56] The defendant testified that they saw the plaintiff carrying the opened and unopened liquor in a public space whilst they were patrolling. They stopped the vehicle, approached the plaintiff and proceeded to introduce themselves and requested permission to search them, nothing was found on them, however, there were liquor next to them on the ground, some were still sealed and some of the liquor was opened. They confiscated the liquor from them, spilled the opened liquor and the sealed ones were taken into the police motor vehicle to be booked at the police station.

[57] The onus rest on the plaintiff to prove that he was unlawfully and wrongfully shot, and injured by the defendant, once the plaintiff has discharged the onus resting on him, the defendant bears the onus to prove that the shooting was lawful.

[58] It is common cause that the plaintiff was shot on the bottom part of his left foot and the bullet exited on the top side of the foot. He sustained fractures of his 3rd and 4th metatarsals and was taken to Kalafong Hospital where he was admitted, treated medically and discharged after two weeks.

[59] The second witness of the plaintiff submitted under cross-examination that the statement he made at the police station is a version of events that was told to him by the plaintiff. As a result the defendant could not proceed with cross examination on that statement.

[60] In *Stellenbosch Farmers Winery Group Limited and Another v Martell Et Cie and Others*⁸, the Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain, as far as possible where the truth lies between conducting factual assertions, the SCA held as follows:

“To come to a conclusion on the disputed issues a court must make findings on:

- a) The credibility of the various factual witnesses;
- b) Their reliability; and
- c) The probabilities...or improbability of each party's version on each of the disputed issues.”

[61] In light of the assessment of (a), (b) and (c), the court will then as a final step determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which doubtless is a rare one, occurs when court credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. When all factors are equipoised probabilities prevail.

[62] Also in *National Employers General Insurance Co Ltd v Jagers*⁹ the court remarked as follows:

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless, where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies 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 false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a

⁸ 2003(1) SA 11 (SCA) at para 5

⁹ 1984 (4) 437 (E) 440D-G

witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case anymore than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and the defendant's version is false".

[63] This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Ko-operative Land Landboumaat Skappy Bpk v Suid Afrikaans Spoorwee en Hawens*¹⁰ and *African Eagle Assurance Co Ltd v Cainer*¹¹, I would merely stress however that when a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the court is satisfied on a balance of probabilities that his version was therefore acceptable.

[64] Lastly in *Govan v Skidmore*¹² the following principle was enunciated "in finding facts or making inferences in a civil case it seems to me that one may as Wigmore conveys in his work on evidence...by balancing probabilities select a conclusion which seems to be more natural or plausible conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one."

[65] I need to apply these authorities to the matter before me because I am faced with two mutually destructive versions on the incident in question; the version of the plaintiff is irreconcilable with that of the defendant, accepting the one version necessarily entails the rejection of the other.

[66] In consideration of the case laws mentioned above starting with the *Stellenbosch Farmers Winery*, I am of the view that the version of the plaintiff is an inherently improbable one. It is improbable that the police would just confiscate their alcohol without

¹⁰ 1974(4)SA 420 (W)

¹¹ 1980 (2) SA 324 (W) [also reported at [1980] 1 All SA 122 (W) - Ed]

¹² 1952 (1) SA 732 (N)

saying anything, and that they would later come back and shot the plaintiff without any reason.

[67] The version of the defendant is the one probable because the defendant took the liquor of the plaintiff and the plaintiff and his friends were unhappy which resulted in them blocking the road for the police to pass through with the vehicle. As a result, the police had to fire shots to protect themselves and also force the public to move away so that they can pass.

[68] The defendant witnesses both corroborated each other on all the material aspects in respect of the incident.

[69] It does not make sense to me that the defendant can confiscate the alcohol and drive away and after some time come back and shoot the plaintiff without any reason. The place where the plaintiff was shot at, it corroborates to me with the version of the defendant that they were shooting at the ground and unfortunately the bullet went to the feet of the plaintiff.

[70] The plaintiff also mentioned in his testimony that after he heard the first shot he did not run and also told the others not to run because, according to him, they did not do anything wrong. He decided to put himself in a position of being shot at.

[71] No one in his reasonable mind can hearing a sound of a gun shot in the darkness but decide not to run just because they did not do anything wrong. From the evidence tendered by the defendant it is reasonably possible that the plaintiff and others were violent. The police required to exercise the shooting to communicate with the plaintiff and others for their safety and in order to pass.

[72] The defendant's version is most probable. It is reasonably possible on balance of probabilities that the reason the plaintiff and other members of the public blocked the road, threw stones to the police; it was because they were not happy with the conduct of

the police of taking their alcohol. The shooting was also a way of self-defence as the police testified that one of them was injured by the conduct of the crowd who threw objects at them. It is possible that they were firing the shots to disperse the crowd. It is highly unlikely that the police would have opted for violence when faced with a docile crowd. The version of the SAPS has a ring of truth to it.

[73] In my view and having regard to the above considerations and the probabilities in their totality the version of the defendant is more probable than that of the plaintiff. Therefore, as per the dicta in the *National Employers General Insurance Co Ltd*¹³, I am satisfied that the defendant's evidence is true and that the plaintiff's version is false.

[74] The only question remaining is whether these facts as found by me based on the evidence of the defendant's witnesses brings a conclusion that the assault or shooting by the police was justified and therefore lawful. The applicable legal principle relates to self-defence, also referred to as private defence and or necessity.

[75] In *Pietersen v Minister of Safety and Security*¹⁴ the court accepted the version of the police and found that the police were entitled to resort to the use of live ammunition to protect their lives.

[76] For the above reasons I am of the view that the Plaintiff has failed to discharge the onus resting on him to prove that the defendant has unlawfully and wrongfully shot the plaintiff.

[77] In view of the conclusion, that the plaintiff failed to discharge the onus resting on him, the issue whether the plaintiff has suffered general damages and special damages as a result of the shooting falls away and need not be decided.

¹³ See fn. 9 at 440D-G

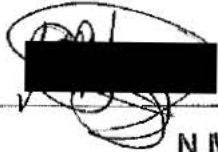
¹⁴ 2007 (2) SA 1997 (c)

[78] The next question relates to costs. The general rule is that costs follow the event result. There is no reason to depart from this general rule.

ORDER

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

1. The plaintiff's claim is dismissed with costs.


N MZUZU
ACTING JUDGE OF THE HIGH COURT
PRETORIA

APPEARANCES

Heard on:	:	03 – 06 February 2025
Judgment delivered on:	:	22 May 2025
For the Plaintiffs:	:	Adv Mantlheng Mphahlele
For the Defendant:	:	Adv M.V Magagane
Instructed by:	:	The State Attorney