



**IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,
(MBOMBELA, MAIN SEAT)**

Case No: 1744/23

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

Date 19/01/2026

Signature

In the matter between:

SENZO GERALD MKHABELA

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGMENT

NYAMBI AJ

INTRODUCTION

[1] The Plaintiff instituted this action against the defendant for damages in the amount of R3 200 000.00, representing general damages, past and future medical

expenses and cost of repairs to his motor vehicle, emanating from an incident wherein members of the defendant fired shots at him.

[2] Before the commencement of the trial, an application in terms of Rule 33(4), for separation of issues was brought, and after consideration thereof, court granted the application, thereby separating the issues of merits and quantum. This judgment, therefore, is in respect of the merits of the case.

BACKGROUND

[3] The claim arises from an incident that occurred on the 3rd of January 2023, wherein members of the South African Police Services, who were conducting an operation, where there were allegations of a planned robbery or bombing of ATM, fired shots at the Plaintiff's motor vehicle.

PLAINTIFF'S CASE

[4] In the version of the Plaintiff, in his particulars of claim, he stated that

“On or about the 3rd day of January 2023 and at or near Matsulu Trust, District of Ehlanzeni, Mpumalanga Province, the Plaintiff was shot by members of the South African Police Services whose full particulars are unknown to him.

The members of the police aforesaid actually fired several gunshots towards the Plaintiff who was seated inside his parked motor vehicle resulting in the Plaintiff sustaining gunshot wounds and the said gunshots also caused damage to his motor vehicle, a Renault Tribes with Registration numbers and letters K[...].”

[5] In support of the Plaintiff's case, evidence of three witnesses was led under oath. The 1st witness, Abel Khoza, testified that he is employed by the IPID as an Assistant Director, and that he was tasked with investigating the case and thereafter compiled an investigative statement.

[6] He told the court, that as per his statement, the information he received had revealed that members of the police had an operation, following on information regarding ATM bombing that was supposed to take place at Matsulu Complex and that the suspects had booked at a Guesthouse next to the complex, and that whilst patrolling, a yellow Renault Tribes, stopped at the gate of the Guesthouse, with 3

occupants. Further that according to the occupants, whilst the car engine was still running, two members of the SAPS approached and knocked on the window, demanding that they open the window, and since the police were wearing balaclavas, the victim got frightened and drove off, alleging that he was under the impression that he was being hijacked and that is when shots were fired towards the direction of motor vehicle, which stopped about 500 meters, from the scene and all the passengers fled on foot.

[7] He further told the court that according to his investigations, no exhibits of spent cartridges were found at the crime scene and that no dangerous weapons were found in the victim's possession. He thus recommended to the NPA that the members of the police be charged, he however confirmed that the NPA declined to prosecute.

[8] The Plaintiff, Senzo Mkhabela, testified that on the day in question he had booked accommodation at a Guesthouse. Upon arrival at the Guesthouse with his friend and girlfriend and whilst waiting for the gate to be opened, he heard a knock on his window and he saw a person wearing a balaclava and dressed in dark clothing, with a rifle, his friend then said they wanted to hijack them, so he panicked and drove off.

[9] It was his testimony that as he drove off, he heard gunshots being fired at the car he was driving, and thereafter window glasses were shattered and the car could not drive properly as he noticed that one of the tyres was flat, so he told the passengers that he would stop and that they must flee on foot and when he did finally stop the car, he took the keys from the ignition and they all fled in different directions.

10] The Plaintiff told court that he ran to a friend's house where he asked to use a phone and he phoned Tracker telling them that his car had been shot at and that he also called his friends to ask where they were and his friends told him that they were at the scene, so they collected him after telling him that there was no hijacking, informing him that it was police that had approached them.

[11] It was his testimony that his friends and girlfriend took him to the clinic in an Avanza motor vehicle and thereafter taken to Rob Ferreira Hospital by ambulance and that after his discharge from hospital in the morning, he went to the police station as he wanted to open a case, he was however informed by the police that he

was also sought by the police who were involved in the incident and that after his interview with the said police, he was merely told that he was at the wrong place at the wrong time. He then opened a case and afterwards reported the matter to IPID and also involved lawyers.

[12] He told court that after several requests, his car was released from police custody, and since his insurance refused to pay his claim, he personally paid the panel beater who fixed his car from his own savings. The Plaintiff denied that he fired the first shot at the police and that had there been an indication that the person knocking on his window was a police, he would not have driven off.

[13] Felicia Ayanda Maphosa, testified that she is the Plaintiff's girlfriend and that she was present on the day of the incident. She told court that they went to a guesthouse and whilst there, a certain guy knocked on the window and the Plaintiff's friend told the Plaintiff to drive off because the car had been following them, and so the Plaintiff drove off and that is when their car was shot at. After a while they stopped and they all got off the car and ran to hide close by.

[14] The witness further told court that their car windows were tinted and dimmed and that she could not see how the guy who was knocking looked like, and that everything was just black, and that there was a white bakkie and Audi without any blue lights, as such they could not tell that they were police as they were also in their normal clothing.

[15] The witness confirmed that she made a statement to the police after the incident and she read the statement into record, confirming that she wrote it herself in English and that she signed the statement confirmed that the statement captured correctly what transpired on the day in question. She then told court that the car was shot at the wheels and the petrol tank and car could then no longer move.

DEFENDANT'S CASE

[16] In their plea, the defendant denied liability and stated that

"Members of the defendant were posted around the vicinity of Matsulu plaza to patrol in order to prevent the planned business robbery."

While the police were on their way they spotted the Plaintiff's vehicle, a yellow sedan with registration number K[...].

The Yellow Sedan was seen patrolling the street, as soon as the police arrived behind Matsulu Spar shop, the yellow vehicle passed them again.

The police approached the Plaintiff's vehicle, and as soon as the Plaintiff saw that it was police, he started firing shots at them. The gunshots came from the driver's side of the motor vehicle.

The members of the defendant retaliated by shooting back into the vehicle in order to safeguard their safety and to immobilize the car in order to apprehend the suspects”.

[17] Evidence of three witnesses was led, under oath, in support of the defendant's defence. Joel Mafere Mashilo testified that on the day in question, under the NIU responsible for cash heists, business robbery and organised crime, assisted in an operation, acting upon information of a planned robbery by an armed group, of SASSA monies which were already loaded into ATM.

[18] He testified that a yellow motor vehicle with registration number K[...] was reported as one of the vehicles parked around the mall and also said to have been seen earlier driving around the area. Further that as he then entered Matsulu and went to park behind Spar and the said yellow motor vehicle came again and as he alighted to approach the car in order to enquire what their interest was as it was midnight, the car drove off. After, a while, he heard gunshots and they drove towards the direction where the yellow motor vehicle went and he found that his members had intercepted a grey Avanza that was spotted earlier, and upon asking where the gunshots came from, he was showed the direction thereof.

[19] He testified further that he then went there and was told that two people alighted from the Avanza and went into the Lodge shouting “Police”, however he found the gate locked and was only opened at around 05:00 am by the receptionist who said she was informed by a neighbour that there were police outside. Upon inspection of the property, they found the fence was cut and further upon breaking into the rooms which were booked, they found equipment used to break into ATMs and there were also cars in the yard which the receptionist said were brought in by the people who booked the rooms and had fled.

[20] He told court that he then went to the scene of the shot motor vehicle and found that it was being processed by others, as the shot car had been abandoned. The witness however commented that as they are an a special operations unit, they can use force when they arrest and only when arrest is being resisted or when suspects shoot at them first.

[21] Warrant Officer Mwandleni Kenneth Twala testified that on the day in question they spotted the Plaintiff's car which fitted the description of one of the cars they briefed about, and as they approached the car which had stopped at a guesthouse, another person came out of the guesthouse and shouted "police" and ran back into the yard. As he was few steps away from the car's door handle, and in full police uniform and a bullet proof vest marked "POLICE", and having identified himself by saying "Police" he heard a gunshot, so he took cover and warned his colleagues.

[22] It was his evidence that the Renault Triber motor vehicle, then screeched its tyres and sped off. He then shot at its tyres to bring it to a halt and his colleague also shot at the wheels. They then gave chase but found the car abandoned with flat tyres, about 500m away. They then secured the scene and also searched nearby houses, and none of the passengers found. Once other police came, they returned to the guesthouse. He confirmed that they only activated their blue lights when they were giving chase to the Plaintiff's motor vehicle, after the shooting.

[23] Phillemon Leboho Mashilo testified that on the day question he assisted in shooting at the Plaintiff's moving car in order to bring it to a standstill and that the shooting was justified because a shot was fired from the Triber first and they retaliated and that there were signs that they were police as they were in full police uniform and with bullet proof vests marked "POLICE", and thus not true that Plaintiff was of the belief that they were being hijacked.

[24] He told court that that W/O Twala identified themselves by shouting the words "POLICE", lastly that, even the people who ran back to the guest house had shouted the words "POLICE". Lastly, that the force that they used was equivalent to the

actions of the Plaintiff and that there were people's lives in danger, including that of his colleague.

ISSUES NOT IN DISPUTE

[25] It is not in dispute that the members of the South African Police Services, on the day in question, were acting within the course and scope of their employment with the Defendant.

[26] It is further not in dispute that the Plaintiff's motor vehicle was shot by members of the South African Police Services on the day in question.

ISSUES IN DISPUTE

[27] It is in dispute that the shooting by the members of the south African police services was justified.

[28] It is also in dispute that the Plaintiff was aware that he was approached by police at the time he drove off and at the time of the shooting.

[29] It is further in dispute that the Plaintiff fired any shot at the members of the police first or at all.

[30] Lastly, it is in dispute that the Defendant bears liability for the Plaintiff's injuries and damages to his motor vehicle.

ONUS AND STANDARD OF PROOF

[31] It is well established that the standard of proof in a civil case is the "balance of probabilities" and in order for a party to succeed in his claim, it is required that he satisfies the court that he is entitled to the relief sought. The burden on this case, falls upon the Plaintiff to prove that he was unlawfully and wrongfully shot by the defendant and the defendant has to justify the shooting.

LEGAL PRINCIPLES AND ANALYSIS

[32] Before court, are mutually destructive versions. On the one hand, the Plaintiff stating that he drove off when approached by the police because of a belief that he was being hijacked. On the other hand, the defendant submitting that they identified

themselves as police, and that they were in full police uniform including a marked bullet proof vest.

[33] The other issue, relates to the contrasting versions, with the Defendant stating that the Plaintiff fired shots or a shot at the police first and the Plaintiff stating that he never fired any shot/s at the police.

[34]. When dealing with two mutually destructive versions, the approach that the court will adopt is the one which was set out in the matter of **National Employer's General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E)**, where the court stated;

"It seems 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 witness will therefore be inextricably bound up with 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 probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case and more than they do defendant's, the Plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[35] In **Stellenbosch Farmers' Winery Group Pty Ltd and Another v Martell Et CIE and Others 2003 (1) SA 11 (SCA)**, the Supreme Court of appeal gave guidance as to the technique to be used by courts when dealing with mutually destructive versions, where the following is stated;

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the

disputed issues a court must make findings on (a) the credibility of the factual witnesses; (b) their reliability; and (c) the probabilities. As to (a) [credibility], the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness[s] candour and demeanour in the witness box; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or put on his behalf, or with the established fact or with his own extra curial statements or actions; (vi) the calibre or cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to the (b), a witness' [reliability] will depend, apart from the factors mentioned under (a)(ii), (iv) and (vi) above, on (i) the opportunities he had to experience of observe the event in question and (ii) the quality and integrity and independence of his recall thereof. As to (c) [probabilities], this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In light of the assessment of (a), (b) and (c) the court will then, as the final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the one, occurs when a court's credibility findings compel it on one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[36] I wish to start with the two notable contradictions in the version of the Plaintiff. In his particulars of claim, he stated that the members of the police aforesaid actually fired several gunshots towards him whilst was seated inside his 'parked' motor vehicle, however, in his evidence in chief, he stated under oath that he panicked and 'drove off' and 'as he drove off', 'he heard gunshots firing at the car he was driving'.

[37] The version therefore pleaded by the Plaintiff, in respect of the shooting is materially different from the version he gave in court. And court is now sitting with two versions by the Plaintiff, that he was shot at whilst sitting in his parked car and the shots having been fired whilst he drove off. This starts putting into question the reliability of the Plaintiff's version of events as these contradictions were not even clarified in court.

[38] In **Minister of Safety and Security v Slabbert [2009] ZASCA 163; [2010] 2 All SA 474 (SCA)** at para 11, the court held that; *“a party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial.*

[39] The Plaintiff's witness, his girlfriend, Felicia Maphosa, also gave the version that is contrary to the pleaded case, stating that the Plaintiff drove off after he was told by his friend to drive off and as they drove off their car was shot at. In line with sentiments of the SCA in the *Slabbert* case, it is impermissible for the Plaintiff to plead a particular case and summersault and tell a different version to court. In this instance, the Plaintiff's witness tells a version which does not corroborate the Plaintiff's pleaded version.

[40] The credibility of the Plaintiff is thus put into question as the court then has to ask itself, which of the two versions by the Plaintiff must the court accept to be true? And the principle, is that a litigant is bound by his or pleadings.

[41] The versions of the Plaintiff and her girlfriend, also differ in as far as they relate to the point at which the Plaintiff drove off. The Plaintiff's girlfriend told court that The Plaintiff's friend Mavivi told Senzo to drive off because the car had been following them. Whereas the Plaintiff told court that his friend said they wanted to hijack them so he panicked and drove off. The Plaintiff did not state that he was instructed by his friend to drive off, but that he drove off because he panicked.

[42] The version of the Plaintiff is riddled with material contradictions such that it is difficult to accept it as reliable and rendering it improbable that the Plaintiff was not aware that he was being approached by the police when he decided to drive off.

[43] The version of the defendant, with its minor imperfections, mainly in respect of what happened prior to the Plaintiff's motor vehicle being identified as suspicious, and whether it was correctly and or fully identified during the briefing prior to the operation, is found to be believable, in as far as it relates to the actual shooting.

[44] The evidence of the two witnesses, who are police officers, Twala and Leboho Mashile, corroborated each other in as far the shooting is concerned and that is that the Plaintiff fired the first shot at them and sped off, thereby prompting them to shoot back and specifically aiming at the vehicle. There were no contradictions in their evidence and no exaggeration found and court finds that their version probably reasonably true.

[45] I must pause to point out that the witness for the Plaintiff, Mr Abel Khoza's testimony, that no cartridges were found on the scene or in the Plaintiff's motor vehicle, does not in any way prove that no shots were fired by the Plaintiff. Mr Khoza, in his evidence stated that even the used cartridges from the shots fired by the police were not recovered, and before court there is evidence that shots were indeed fired by the police. Therefore, the question, which the court was not necessarily called to answer, is whether the investigations were thorough or not? Because if the investigations were thorough, there would have been recovery of at least the police's used cartridges, to then persuade court that there is proof where shots were fired and none where no shots were fired.

[46] The court accepts as the most probable version, the corroborated evidence of the two defendant witnesses, that they were in full police uniform when they approached the suspicious car which had been identified as one of the cars which were to form part of the planned robbery, that the police retaliated after a shot was fired by the Plaintiff who then drove off. Further that the intention was to immobilise the vehicle of the plaintiff which the Plaintiff drove off at the sight of the police.

[47] It is difficult to believe that Plaintiff's witness, Felicia, when she stated that the police officers were wearing their own clothes and not in uniform. This the court notes, as the witness' evidence was that their car had windows tinted and dimmed and could not see the person knocking properly. Yet on the other hand, she wants the court to believe that she saw them wearing their own clothes. Her contradictions points to a narrative that was fabricated to say that they were not aware that they were approached by police.

[48] The evidence before court, that the petrol tank of the Plaintiff's motor vehicle was shot as well as the tyres, corroborates the version of the defendant that the shots were aimed at immobilising the Plaintiff's motor vehicle, and not aimed at the Plaintiff or the other passengers. This adds weight also to the credibility of the defendant's witnesses, as the Plaintiff's witness, Felicia also confirmed that the motor vehicle was shot at the petrol tank and tyres.

[49] There is thus no other justified way that the defendant would have acted under the circumstances of this case, other than how Twala and Mashilo acted on that day in question as their lives were threatened by the shot fired by the Plaintiff and the Plaintiff, who was suspected of being part people who were planning to commit a crime, drove off fleeing police who had identified themselves and who were in police uniform.

RULING

[50] In light of the contradictions and improbability in the Plaintiff's version, court finds that the Plaintiff did not tell the truth and his version accordingly rejected as false. And court has no reservations in accepting the version of the defendant as true and thus accepting it. The Plaintiff has failed to prove any wrongful or unlawful conduct on the part of the defendant and the defendant has on the other hand successfully justified the shooting on the day in question. Accordingly, defendant is not liable for the damages suffered by the Plaintiff on the day in question and thus Plaintiff's claim stands to fail.

[50] There is no reason why costs should not follow the result.

ORDER

In the result, I make the following order:

1. The Plaintiff's claim is dismissed.
2. Plaintiff is ordered to pay the costs of the action on party and party scale.

TLL NYAMBI
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff : Mr K Khoza
: Mpho Mashiloane Attorneys

For the Defendant : Adv MS Ngomane
: NP Ngubane Attorneys
c/o The State Attorney, Nelspruit

Date of hearing :11 November 2025

Date of Judgment :19 January 2026

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand down is deemed to be the 19th of January 2026 at 15:00