

SOUTH AFRICA / JUDGMENT

Rabothata v Minister of Police

(56775/19) [2021] ZAGPPHC 511; 2021 (2) SACR 544 (GP) (12 August 2021)

[2021] ZAGPPHC 511

COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo AJ

CASE / FILE NUMBER

56775/19

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IN

THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA
(1)

REPORTABLE:	Yes (2) OF INTEREST TO OTHER JUDGES: Yes (3)
REVISED:	Yes
Date:	12/08/2021 CASE
NO:	56775/19 In
the matter between:	RABOTHATA, KAGISO OCTAVIUS Plaintiff - And - MINISTER OF POLICE Defendant

JUDGMENT

Khumalo AJ

BRIEF BACKGROUND TO THE MATTER

[1]. On 22 April 2018 at about 12h30 in Shoshaguve Block W, Kagiso Rabothata the plaintiff, was shot by a member of the South African Police Services (the SAPS”) whilst acting within the course and scope of his employment. The defendant is vicariously liable for the unlawful conduct of the members of the SAPS that is committed whilst acting within the course and scope of their employment.

[2]. Plaintiff sued the defendant for damages arising from an alleged unlawful arrest and detention and delictual damages suffered as a result of the injuries inflicted upon him during the course of the arrest.

[3]. At the beginning of the trial, Counsel for the plaintiff advised the court that Plaintiff is abandoning his claim relating to the alleged unlawful arrest and detention and that he is proceeding with the delictual claim based on the injuries sustained during the attempted arrest by the members of the SAPS.

[4]. Further, the parties advised the Court that they have agreed to separate the issue of merits and quantum and would only be proceeding with the issue of merits and the issue of quantum is postponed sine die.

[5]. It is common cause that plaintiff was shot and injured during the attempted arrest at Soshanguve. He sustained an injury on his left thigh.

[6]. Plaintiff alleged that the police had mistaken him for a suspect who was involved in a car hijacking at Winterveldt, a township about 13 kilometres from where the plaintiff was shot. The hijacking incident apparently happened in the morning of that day.

[7]. Plaintiff further alleged that the injuries he sustained were caused solely by the negligence on the part of the members of the SAPS who were negligent in one or more of the following ways:

7.1 The police officers failed and/or neglected to properly identify the plaintiff before shooting at him;

6.2 The police officers shot at the plaintiff with live ammunition causing him serious injuries.

[8]. Defendant denied liability on the basis that the police officers were not negligent and pleaded specifically that the use of force in effecting the plaintiff’s arrest was in accordance with the provisions of section 49(2) of the Criminal Procedure Act, 51 of 1977 (the “CPA”).

[9]. Section 49 of the CPA provides as follows:

“Use of force in effecting arrest

- (1) For the purposes of this section-
- (a) 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect;
 - (b) 'suspect' means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and
 - (c) 'deadly force' means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.
- (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-
- (a) the suspect poses a threat of serious violence to the arrestor or any other person; or
 - (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.

[S. 49 substituted by s. 7 of Act 122 of 1998 and by s. 1 of Act 9 of 2012.]”

[10]. An act that causes injury to another, or death, is prima facie wrongful.[1] However section 49(2) sanctions the use of force including deadly force in certain specified instances when effecting an arrest. Deadly force is defined in the section to mean force that is likely to cause serious bodily harm or death and includes as in this matter the shooting at the suspect with a firearm.

[11]. It is clear from the section that the use of deadly force is limited only to those instances where the suspect poses a threat of serious violence to the arrestor or any other person. The defence is seeking to rely on this section on the basis that the suspect posed a serious threat of violence to the arrestor in that he pointed a firearm at him when he attempted to arrest the plaintiff.

[12]. Thus the use of force including deadly force is justifiable only in those circumstances enumerated above which then raises the question whether an arrestor would be justified in using force when the suspect is wrongly identified as the perpetrator of an offence in section 49(2)(b).

[13]. We live in a constitutional democracy and our Constitution demands respect for the life, dignity and physical integrity of every individual.[2] Whilst section 49(2) of the CPA seeks to grant the right to use force including deadly force in certain circumstances, it is the view of this court that its interpretation should be limited to those genuine instances where the life and/or safety of the arrestor or other person is threatened.

[14]. Plaintiff alleged that he was identified wrongly as the suspect who was early involved in a hijacking in Winterveldt and shot in the process. It is alleged that he threatened the life and safety of the police officer who attempted to arrest him.

[15]. The plaintiff testified and four other witnesses testified on his behalf. The defence on the other hand only called the police officer who discharged the firearm and injured the plaintiff. The defence called no other witness to corroborate its main witness.

[16]. The Plaintiff testified that on that fateful day and at the time of his shooting, he was in the company of his friend Daniel and they had gone to picking up his shoe from a shoemaker and were on their way back to his home. He had the shoe in a green and black bag that he was carrying and had a litre of a beer on one hand that he and his friend were sharing.

[17]. They heard gunshots and they did not wait to see where the gunshots came from or who was shooting, they ran away. It was during that commotion that he was shot from the back on his left thigh. At the time, he was dressed in a black jean, white T-shirt and a white cap and carrying a green and black bag.

[18]. He denied that he was ever involved in any hi-jacking let alone being at Winterveldt that morning where the hi-jacking allegedly happened. He stated that in the morning, he was at his home and his mother sent him to the shops to buy her a packet of rice for her Sunday cooking. Upon his return, he asked her money in order to go and fetch his shoe that he had earlier left at the shoemaker for repairs.

[19]. He stated that he had taken the shoe for repairs because he was going to attend a job interview the following day at Rosslyn for a security guard position. He is a trained security guard and his sister arranged the interview on his behalf.

[20]. He had gone to fetch his shoe in the company of his friend Daniel and on their way back, they heard gunshots. They ran away without checking who was shooting and from where the gunshots came from.

[21]. He denied that he had a firearm with him on that day and that he pointed this firearm at the police officer who shot him. He is not trained the use of a firearm and does not carry or own one.

[22]. On the issue of the hijacking, he testified that he and his friend cannot drive and they could not have driven the vehicle from Winterveldt to where they were allegedly found.

[23]. Daniels evidence corroborated the evidence of the Plaintiff. He testified that he was in the company of the plaintiff at all material times on the day in question. He confirmed that at the time of the incident, they had come back from picking up the plaintiff's shoe from a shoemaker

when they heard gunshots within their vicinity. They both ran away in the direction of the passage and he decided to lie down whilst his friend the plaintiff continued with his run. He ran back to the shoemaker after realising that his friend was shot and reported to him what happened to the plaintiff. At that stage he did not have any knowledge whether the plaintiff was still alive or not.

[24]. The shoemaker went to the scene to investigate and came back to tell him that plaintiff was injured and was being arrested by the police for an alleged hijacking in Winterveldt.

[25]. He went back to the scene and demanded that he be arrested also as he was with the plaintiff at all material times. His demand was not acceded.

[26]. Daniel collaborated the evidence of the plaintiff although there was some discrepancy between them, which related to when exactly did plaintiff buy the beer they were sharing. In my view, there is not much that turns around that discrepancy.

[27]. The next witness was the neighbour who testified that she had earlier seen the plaintiff and his friend Daniel walking down the passage. She lives next to the place where the incident happened. She was on her way to the shops to buy a cold drink when she saw the Plaintiff and his friend on the street. On her way back, she heard gunshots and she ran into her house.

[28]. Once the shooting stopped, she went out to investigate. She saw a person on the ground and she went to look. She then saw that the person was Kagiso, the plaintiff. She enquired from the police what happened and she was told that Kagiso hijacked a motor vehicle in Winterveldt.

[29]. She disputed this allegation made by the police and told them it cannot be true as she saw both Kagiso and Daniel earlier passing her house when she was on her way to buy her cold drink and as such, Kagiso could not have been involved in the hijacking of a vehicle as alleged by the police.

[30]. She also took photographs at the scene and one of the photos taken by her depicted the plaintiff on the ground in a passage. There were three police officer near him. There was also a white cap, a bag and a beer bottle. This piece of evidence collaborated that of the two previous witnesses.

[31]. She further testified that the members of the community apprehended the “real” suspect and assaulted him.

[32]. More importantly, she confirmed seeing the police officer removing a bullet from the plaintiff’s thigh using a knife and uncuffing him. She sent a child to Kagiso’s home to report to his mother what happened.

[33]. The shoemaker was also called to testify and he collaborated the version of the plaintiff and his friend. He confirmed that earlier in the morning plaintiff brought to him a shoe for repairs. He confirmed that the plaintiff and Daniel came to his place at around about 12h45 to fetch the shoe. He further confirmed that shortly thereafter, Daniel arrived back at his house to tell him that plaintiff was shot by the police.

[34]. He left Daniel at his house and went to the scene to check on the plaintiff. He found the Plaintiff injured and arrested. He tried to explain to the police that they had the wrong person since the plaintiff had come from his house to fetch his shoe that he brought earlier for repairs. He then went back to his house to tell Daniel that his friend was not dead but being arrested.

[35]. The other witness to collaborate the version of the plaintiff was his mother, Violet Rabothata. He confirmed that earlier on the day in question, she sent plaintiff to the shops to buy her rice and later gave him R10.00 to pay the shoemaker for repairing his shoes.

[36]. She confirmed that a child came to report that the police had shot her son and she felt paralysed and could not go to the scene as she thought the worst, that her son was dead. Her daughter and sister to the plaintiff attended at the scene and reported to her that plaintiff was injured but alive.

[37]. She further stated that she went to the police station later with her daughter and saw the police officer who shot her son. Her description of the said officer was that he appeared extremely nervous and was chain smoking and kept on saying that he made a mistake and said this in isiZulu.

[38]. Plaintiff closed its case without leading any further evidence.

[39]. The defence called Mr. Gqulu to testify. He told this court that he is a constable attached to the K9 unit. He testified that on the day in question, they picked up a radio message about a motor vehicle that was hijacked at Winterveldt that morning and that the said vehicle was parked at a carwash in Soshanguve Block W.

[40]. They drove to the scene and three suspects alighted from vehicle and ran away when they saw the police approach. He described the clothing worn by the suspects and stated that two of them wore black denims (jeans) and white t-shirts. The other suspect wore a black overall top.

[41]. They chased the suspects and one of them wearing a black denim and a white T-shirt split from the other two and disappeared from the scene.

[42]. I hastily add that no mention of any of the suspects carrying a bag or wearing a cap.

[43]. He chased the other two suspects and alleged that he called on them to stop. The one suspect wearing a black denim (jean) and a white t-shirt turned around and pointed a firearm at him. He fired two warning shots but the suspects continued to run away. He then shot the one suspect and the other turned around, picked up the firearm and ran away. He could not fire at this suspect as he feared injuring members of the public who were in the vicinity. He ostensibly shot at the suspect as he felt his life and safety was threatened.

[44]. I stated under cross-examination that the said suspect pointed the firearm at him four times. He denied that the suspect he shot had a bottle of beer in his hand or that he ever saw one on the day. When he was confronted under cross-examination with the photograph that depicted the plaintiff the ground, with a white cap next to him, a beer bottle on his left and the bag in front of him, he simply stated that he did not notice as the place was dirty. The examination of the photograph indicated to me that the place was not as dirty as the witness would have this court believe bar the fact that there was what looked like weed, which normally would grow in places that are not care for properly.

[45]. In this matter, this court was presented with two conflicting versions that are mutually destructive of each other. The only commonality between the parties versions is the fact that plaintiff was shot and injured by the members of the SAPS.

The Factual dispute

[46]. In civil cases, the measure of proof is a preponderance of probabilities. When the two competing versions intersect the question of credibility comes into play as well. The narrow ambit of the facts in this matter is whether the plaintiff was a fugitive from justice when he was shot and whether he indeed threatened the life of the police officer who was giving chase or he was an innocent victim of a mistaken identity.

[47]. To borrow an expression from Van der Linde J in *The South African Bank of Athens v 24 Hour Cash CC* (A3027/2016)

[2016] ZAGPJHC 217 (11 August 2016), it is as narrow as that, because it stands fast that on the day in question, plaintiff was shot and injured by a member of the SAPS. As in the above quoted matter, two derivative factual issues are contested.

[48]. First, was plaintiff a fugitive from justice who had threatened the life of the police officer giving the chase or an innocent victim of a mistaken identity. The defendant's contestation is that the plaintiff was involved in a car hijacking at Winterveldt and thus a fugitive from justice and had threatened the life of the officer who was giving chase. Plaintiff on the other hand insisted that he was nowhere near Winterveldt on the day in question let alone hijack a motor vehicle or that he had a gun, which he allegedly pointed at the officer who was giving chase. He and his friend cannot even drive so he said.

[49]. The second subsidiary issue was whether the concerned police officer's conduct falls within the ambit of section 49(2) of the CPA. To this end, Mr. Gqulu, the defence witness alleged that the plaintiff pointed a firearm at him no less than four times and he shot him in self-defence and/or to protect members of the public. No firearm was found at the scene and he alleged that plaintiff's accomplice who was running with him at the time turned back and picked up the gun and ran away with it.

The approach to assessing evidence

[50]. A helpful discussion of this topic appears in the judgment of Van der Spuy, AJ in *Selamolele v Makhado*, which is quoted in the matter of *The South African Bank of Athens*[3] above with apparent approval. I believe it will be helpful to quote the discussion in full as was done in the *South African Bank of Athens*:

"The onus of proof and the legal requirements as to the discharge thereof"

It is common cause that plaintiff bears the overall onus of proof, i.e. he must prove his version that he was pushed from behind and did not fall fortuitously backwards after a scuffle with defendant. It may be that defendant has some duty of adducing evidence in support of the latter version but the onus of proof in the overall case never shifts and remains on plaintiff. See *Pillay v Krishna* 1946 AD 946 at 952-3. A disagreement arose between counsel for the 1 1988(2) SA 372 (V), at

374. Two parties, i.e. Mr Botha for plaintiff and Mr Pieterse for defendant, concerning that approach which I should adopt when determining whether plaintiff has discharged the onus of proving his version on a balance - preponderance - of probabilities. The disagreement arises from the well-known statement of the law in *National Employers' Mutual General Insurance Association v Gany* 1931 AD 187 at 199:

'Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false.'

Mr Pieterse submits that this case presents 'a classic example of two mutually destructive versions. The one excludes the other.' With that submission, I agree. Mr Pieterse then quotes cases in which the dicta in Gany's case have been interpreted, i.e. *Koster Koöperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* 1974

(4) SA 420 (T) at 426 and *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 237 - 8, the latter case being cited with apparent approval but without comment in *AA Mutual Insurance Association Ltd v Manjani* 1982 (1) SA 790 (A) at 793G - H. He then submits that where there are probabilities, inherent or otherwise, the Court decides on the balance - preponderance - of probabilities. At the end of the day, so he contends:

"The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence that was led by plaintiff and defendant and all their respective witnesses as well as all the surrounding circumstances of the case.'

It is clear to me that defendant's submissions tend to overemphasise a scrutiny of the probabilities of the matter as against findings on credibility. Mr Pieterse no doubt had in mind what Coetzee J stated in the case of Cainer (*supra* at 237F): 'Where there are

probabilities, inherent or otherwise, there is no room for this approach.' (The Gany approach.)

But one must be careful not to

interpret those remarks as signifying that the Court's function of discerning the truth or falsity of witnesses' evidence becomes

unnecessary where probabilities exist or less important when looking at the probabilities. One must not lose sight of the earlier

conclusion of the same learned judge at 237H when dealing with mutually destructive versions:

'The position is simply that there is no proof, by any criterion, unless one is satisfied that one witness (*sic* witness's) evidence is true and that of the other is false.' Ultimately the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence

of the witnesses and, secondly, an ascertainment of which of two versions is the more probable. See *Maitland and Kensington Bus Co (Pty) Ltd v Jennings* 1940 CPD 489 at 492 where Davis J stated:

'For judgment to be given for the plaintiff the Court must be satisfied that sufficient reliance can be placed on his story for there to exist a strong probability that his version is the true one.'

(Italicised by me.) As pointed out by Clayden J. in *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd* (1) 1955 (2) SA 1 (W) at 13 - 14:

'Though a "strong probability" may be less than "absolute reliance" it seems with respect that an unnecessary adjective has been introduced.'

It would therefore be correct for me to say that in order to give judgment for plaintiff I must be satisfied on adequate grounds that sufficient reliance can be placed on the story of the plaintiff and his witnesses, showing that their version is more probable than that of the defendant. But one still has to go through the process of considering the credibility of the witnesses and of assessing their weight or cogency and after these processes have been completed

'What is being weighed in the "balance" is not quantities of evidence, but are probabilities arising from that evidence and all the circumstances of the case'.

See Hoffmann and Zeffertt SA *Law of Evidence* 3rd ed at 411. When, on the other hand, Mr Botha submits that

'in view of the overwhelming evidence tendered by plaintiff and in my view the unreliability of the evidence preferred by the defendant, the Court is not called upon to consider inherent probabilities in the matter other than those borne out by the evidence' his submission is also not entirely acceptable. Because, in the process of determining credibility, the Court is charged with the investigation not only of seeking demonstrations of falsehood in the evidence of an individual witness but of weighing the inherent probabilities in his/her evidence showing that it may be false, though these improbabilities would, of course, be revealed by the circumstances of the case as a whole. But, as I have said, Mr Pieterse in emphasising the 'probabilities favouring defendant's version' might also have underestimated the Court's duty of examining the credibility of the witnesses on both sides. I must say something about the balance of probabilities or the preponderance of probabilities argued by both counsel. It is of course clear that the Court is not engaged at the end of the day in a mere mechanical process of balancing out the number of acceptable witnesses on the one side and the other because

'the object of the law is, or ought to be, to secure the sequence of I certain results upon certain objective facts'.

See Wigmore Evidence (1981 ed) para 2498. As to the degree of probability that is sufficient for plaintiff to discharge the onus, see the remarks of Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB) at 373 cited in *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 157D. If the acceptable evidence is such that I can safely say 'I think that it is more probable than not' the burden is discharged, but if the probabilities are equal, it is not."

The court a quo referred to the judgment in the Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie* 2003(1) SA 11 SCA. 3 At [5]:

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. Therefore, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. 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 various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), 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' 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 established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the

event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its

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 will doubtless be the rare one, occurs when a court's 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. But when all factors are equipoised probabilities prevail.”

Assessing the evidence led before this court

[51]. Like Van der Linde J in the South African Bank of Athens^[4] matter I take from these dicta the cue that where versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined.

“This endeavour is not to be equated with box-ticking; the constituent parts of the exercise are merely to underscore the breadth of the field to be covered. The focal point of the exercise remains to find the truth of what happened; these considerations are markers along the way.”^[5]

[52]. Starting then with the credibility and reliability issues, this court finds the defence witness wanting. It is clear to that the person who was shot was wearing a black jean, white t-shirt, a white cap and was carrying with him a green bag which later was confirmed to have contained a pair of shoes and that he carried a bottle of beer.

[53]. The suspect according to the defence witness was wearing a black jean, a white t-shirt and carrying a gun. No mention was made of a cap and or a bag or bottle of beer at the time of the initial chase. He in fact denied that the plaintiff was carrying a beer bottle. He however confirmed under cross-examination that the plaintiff was found in possession a green and black bag, which upon further examination was found to contain a shoe.

[54]. This witness was confronted with a picture taken on that day during the incident by one of the witnesses. This picture showed the image of the plaintiff on the ground, next to him there is a white cap and a bottle of beer. His answer was simply that he cannot remember but the place was dirty.

[55]. A number of witnesses testified that this witness was heard telling his colleagues that he made a mistake and this was understood to mean that he had shot a wrong person. He again denied this and insisted that he had the right person. This flies at the face of all logic if conspectus of all the evidence in this matter is taken into consideration.

[56]. He claims that the plaintiff was put under arrest after he was shot. However, the handcuffs were taken off at some stage. According to Plaintiff, the handcuffs were taken off shortly after Gqulu had removed the bullet from his thigh and upon the realization that they had shot and arrested a wrong person. He in fact stated that he thought the police officer was assisting him. Gqulu on the other hand denied that he ever removed the bullet from the plaintiff and stated that he removed the handcuffs because they realized that the plaintiff was injured and would not be able to run away.

[57]. This I find hard to believe taking all the evidence into consideration. There is no formal record anywhere that suggest that the plaintiff was arrested. The warning statement document was not completed and there is no record of the plaintiff ever appearing in any court taking into account that the plaintiff was supposed to have been a suspect in a very serious crime, that of hijacking, a crime that would have entitled the witness to shoot at the plaintiff. One would have expected some explanation why the plaintiff was never arraigned in any court bearing in mind that the purpose of arrest is precisely that, to bring a suspect before court.

[58]. Again, the probabilities in this matter do not favour the defence's story. How probable is it that a suspect carrying a firearm being chased by members of the SAPS who were firing their weapons would not shoot back. It is alleged that he merely pointed the gun at the witness four times and did not fire not even once.

[59]. It was further alleged that the plaintiff dropped the gun after he was shot and his accomplice turned back to pick it up and ran away with it. Why would the accomplice risk his life by turn back to pick up a gun simply to run away with it when in fact his partner in crime had just been shot? This is highly improbable and the only explanation is that this was a fable.

[60]. Further, the evidence before this court, which was not controverted was that plaintiff was in the company of Daniel at the time. Logic dictates that it must have been Daniel who picked up the gun and ran away with it. Daniel stated that he chose to lie on the ground when they heard the shots and he subsequently ran back to the shoemaker when he realised that the plaintiff was shot. Later he came back after he was told that Daniel was injured and being arrested. He demanded his arrest also as he was with the

plaintiff all the time when the hijacking was alleged to have happened.

[61]. If indeed things happened as alleged by the defendant's witness, surely it is improbable that Daniel would have returned to demand his arrest since he was in the company of the plaintiff at all material times.

[62]. Witnesses for and on behalf of the plaintiff testified that Mr. Gqulu was heard stating in Zulu that he made a mistake. He however denied ever uttering any such words and stated that he does not speak Zulu but speaks Xhosa.

[63]. I do not think that much turns on whether Gqulu speaks Zulu or Xhosa. I take judicial notice of the fact that Xhosa and Zulu are all Nguni languages and are related. To non-nguni speakers may sound the same.

[64]. More disturbing is the fact that there must have been other members of the SAPS present at the time of the incident and members from the metro police unit. As a matter of fact, the photograph exhibited in court showed a number of police officers on the scene but none came forward to collaborate Gqulu's story. I raise this issue since Counsel for the defendant criticized the plaintiff for his failure to call his sister who he alleged arranged the job interview for him to testify.

[65]. I do not believe that the sister would have given any more light to this court than what has already been put before it. On the other hand, I am of the view that other police officers who were present on the scene could have shed more light to the events of the day. Not even the investigating officer was called to at least shed some light why the plaintiff was never arraigned in court if indeed he was arrested as alleged.

[66]. On the other hand, I heard the evidence of the plaintiff, which evidence was collaborated by at least three other witnesses. I do not have to repeat what they said as I have already mentioned their evidence above. I must state that I was impressed by their demeanour during their testimony. There may have been minor contradictions and by and large, they collaborated each other and

[67]. If one is to consider the probabilities and improbabilities of the two versions, the version of the defendant strikes me more as the one that is improbable.

[68]. I need mention but a few and these are not intended to be exhaustive of all the probabilities and improbabilities.

[69]. The plaintiff alleged that he was shot coming back from a shoemaker to collect his shoe. A shoe was found in the bag he was carrying. More so, the said shoemaker testified before this court and confirmed the plaintiff's version. Juxtaposed this version of the plaintiff with that of the defendant's witness. I find it highly improbable that a vehicle hijacker confronted by the possibility of being arrested, let alone being shot would bother to carry and run away with a bag containing only a shoe.

[70]. Plaintiff also alleged that at the time he was shot, he was carrying a beer bottle on one hand, a beer he shared with his friend. A beer bottle was indeed at the scene of the shooting and when confronted with this fact, the defendant's witness denied that the plaintiff had a bottle of beer with him at the time he was shot. Again, the evidence in this regard speak for itself. The beer bottle was there on the ground in front of the plaintiff.

[71]. There is also the not so small a matter of the gun that is alleged the plaintiff carried and used to point several times to the defendant's witness. The gun was never found at the scene of the incident. The defendant's witness alleges that the plaintiff's accomplice turned back to pick it up and ran away with it after the plaintiff was shot. This again considering the conspectus of the evidence led is, with respect improbable. This presupposes that either the two suspects were running shoulder to shoulder or the other accomplice slightly ahead for him to have realised that his accomplice was shot and dropped the firearm and for whatever reason turned back to pick it up. He supposedly did this whilst gunshots were fired at them.

[72]. Several gunshots were fired on the day. The neighbour testified that they picked up several bullet cartridges and gave them to the plaintiff's mother. It is highly improbable that faced with that situation and his accomplice having been just shot, he would have dared to turn around to pick up a gun that had fallen from his comrade and after so doing just run away without firing a single shot himself.

[73]. Gqulu when questioned why he did not shoot at this suspect, his answer was also not satisfactory. He managed to shoot the plaintiff without any fear that he might shoot innocent passers-by and yet has concerns thereafter when faced with a suspect who had just turned around to pick up the gun lost by his comrade. He at this stage did not have any concerns about his own safety. Surely if that did happen, he must have had concerns about his own safety and would probably have also shot at this suspect.

[74]. To further compound the issues for the defendant, it is alleged that he was arrested. However, the warning statement is not properly completed which could only lead to one conclusion that he probably was not put under arrest.

[75]. We were told that the plaintiff was admitted in hospital and it should have been easy to comply with all the requirements. This confirms the plaintiff's story that upon realization that a wrong person had been shot, the police officer went on to uncuff him and assisted him with the necessary first aid and he was then taken to hospital with the other suspect who was apprehended by the members of the community.

[76]. Plaintiff stated that he was not under police guard at the hospital and it is common knowledge no matter how serious the injuries or how sick a suspect or convict may be, he /she will always be under police and/or correctional services guard.

[77]. Jeans and T-shirts are a common attire especially for the young and not only in townships but everywhere. It is more probable that the defendant's witness had mistaken the plaintiff for his suspect as he described two of the suspects as having been wearing black jeans and white t-shirts and the other a black overall top. What he never mentioned was anyone of the suspects wearing a cap and or carrying a bag. The bag issue was elicited during his cross-examination.

[78]. Based on all of the above, it is clear that Gqulu shot at a wrong person. He shot an innocent person who like every normal person, ran away when he heard gunshots fired in close proximity.

[79]. Counsel for the plaintiff submitted that in the light of the fact that the defendant admitted that members of the police shot the plaintiff and pleaded that the provisions of section 49(2) were applicable, the onus was for the defendant to prove its defence.

[80]. I agree with counsel's submission in this regard. The overall onus in civil matters rests with the plaintiff. Once it has discharged same, the onus would shift to the defendant to prove its defence.

[81]. It is admitted that plaintiff was shot and seriously injured by a member of SAPS on the day in question. The said member was acting within the course and scope of his employment. The defendant is vicariously liable for any damages caused by unlawful and or negligent conduct of members of the SAPS.

[82]. The defendant admitted the shooting and specifically pleaded that the use of force was in accordance with the provisions of section 49(2) of the CPA.

[83]. The provisions of section 49(2) referred to above do not and were not intended to give carte blanche powers to members of the SAPS to use force to effect an arrest on any suspect. Force and lethal force in particular may only be resorted to when confronted by a situation stipulated in subsection (2)(a) and (b). Its interpretation must be such that it promotes the value system of an open and democratic society based on human dignity, equality and freedom.

[84]. Further, it was stated and not challenged that the plaintiff was shot from the back and this stands in contrast with a person who posed a danger to the shooter.

[85]. I have expressed serious doubts with the version of events as described by the defendant's witness and based on those reservation, this court rejects it as improbable and therefore untrue. That being the case, the defence raised in this regard cannot stand.

[86]. The issue that remains to be determined is whether in the circumstances, the plaintiff has proved negligence or unlawfulness on the part of the members of the SAPS.

[87]. This court accepts the evidence of the plaintiff and his witnesses as the one more probable in the circumstances.

[88]. It is clear from the evidence led that the plaintiff was not and could not have been involved in the hijacking that occurred at Winterveldt and as such could not have been a suspect in the matter. If that is to be accepted, the police officer concerned did not have any probable cause to shoot and or arrest the plaintiff.

[89]. Further, in the light of the fact that the evidence of Gqulu is rejected and in particular the allegation that plaintiff pointed a firearm at him, it follows that his life or that of members of the public was not in danger and he ought to have ascertain the identity of the suspect before opening fire at the plaintiff. He was negligent in opening fire at the plaintiff without having satisfied himself as to the correct identity of the suspect.

[90]. I am alive to his assertion that he never at any time lost sight of the suspects that he has chasing. This again is unbelievable. Had it been so, he would have noticed Daniel who was in the company of the plaintiff. His evidence was that the two suspects he was chasing, one was dressed similar to the plaintiff i.e. a black jean and a t-shirt and the other was wearing a black overall top.

[91]. Daniel, after learning from the shoemaker that his friend was injured and he was being arrested for the alleged hijacking, he returned to the scene and demanded that he be arrested as he was with the plaintiff at all material times. In the light of the story of Gqulu that the plaintiff's accomplice ran away with the gun, one would have expected that Daniel would certainly have be quizzed about that issue at least if not arrested with the plaintiff. None of that happened.

[92]. The only reasonable inference is that as alleged by the plaintiff and his witnesses, the police realized that a wrong person had been shot.

[93]. Gqulu who alleged that he never lost sight of the suspects and estimated a distance of no more than fifteen meters from them failed to notice that plaintiff, though dressed similar to his suspect had another distinguishing item of clothing. He was wearing a white cap which should have been visible to him if one is to believe that the suspect turned not just once but four times to point a firearm at him.

[94]. A reasonable officer in his position should have been able to notice and refrain from shooting the plaintiff. The bag which upon examination contained a shoe and the bottle of beer prove on a balance of probabilities that a wrong person was shot and the police had no reasonable grounds to put him on the scene of the hijacking and or shoot at him. Their conduct is therefore wrongful and unlawful.

[95]. In the circumstances, the following order is made:

1. The defendant is vicariously liable for the injuries sustained by the plaintiff;
2. The Defendant is liable to pay the damages that the plaintiff may be able to prove; and
3. Defendant is to pay the costs of this action.

KHUMALO MP

Acting Judge of the High Court of South Africa

Gauteng North Division, Pretoria

[1] Cape Town Municipality v Paine 1923 AD 207 at 216-217; Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) para 12 and Minister van Veiligheid en Sekuriteit v Geldenhuys 2004 (1) SA 515 (SCA) para 24.

[2] See Ex Parte The Minister of Safety and Security and Others v Walters CCT28/01 at paragraph [44]

[3] At paragraphs [6] to [10]

[4] Supra at [11]

[5] See The South African Bank of Athens v 24 Hour CC (A3027/2016)

[2016] ZAGPJHC 217 (11 August 2016) at p 6 para [11]

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