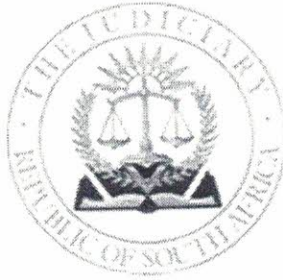


## REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA**  
**(NORTH GAUTENG, PRETORIA)**

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

26 April 2018

DATE

*[Handwritten Signature]*

SIGNATURE

CASE NO: 40923/13

In the matter between:

**JONAS JABU MGIJIMA**

**Plaintiff**

and

**MINISTER OF POLICE**

**1<sup>st</sup> Defendant**

**C P LESUPI**

**2<sup>nd</sup> Defendant**

**R S DIJOE**

**3<sup>rd</sup> Defendant**

**R D NGOATO**

**4<sup>th</sup> Defendant**

**MEC FOR HEALTH, GAUTENG**

**PROVINCIAL GOVERNMENT**

**Third Party**

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**JUDGMENT**

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**MOLOPA-SETHOSA J**

[1] The Plaintiff in this action, Jonas Jabu Mgijima (“plaintiff”) has instituted action against the Minister of Police and three others (“the defendants”) for damages arising out of a shooting by members of the South African Police Service [SAPS] (“the police”) on 16 March 2011, resulting in the plaintiff sustaining an injury to his left leg, as a result of which injury the plaintiff’s leg was amputated below the left knee on 21 March 2011 at George Mukhari Hospital.

[2] The defendants have joined the MEC for Health, Gauteng, as a third [3rd] party to the action in terms of Rule 13 of the Uniform Rules of Court on the basis that the conduct of the nurses and medical personnel at Odi and George Mukhari Hospitals, in medically treating the plaintiff, were negligent and contributed to the sequelae of the injuries sustained by the plaintiff.

[3] It is common cause that:

[3.1] The plaintiff was shot at by the police, acting within the course and scope of their employment with the first defendant, on 16 March 2011 at Setebe Village in Mabopane.

[3.2] The plaintiff sustained an injury to his left leg from the shooting aforesaid, and his left leg was subsequently amputated below the knee.

[3.3] The plaintiff was admitted on 16 March 2016 at Odi Hospital and was transferred on the same day to George Mukhari Hospital.

[3.4] Medical and nursing personnel at Odi and George Mukhari Hospitals, acting within the course and scope of their employment with the third party, rendered medical and nursing services to the plaintiff whilst admitted as a patient.

[4] The issues for determination are whether the police acted lawfully in shooting the plaintiff and had reason to use firearms on the day in question; whether the plaintiff prompted the police to shoot him when he ran away after the police had arrived at the scene of the incident at Setebe Village, Mabopane; further, whether the plaintiff contributed to the sequelae of his injuries when he attempted to remove the bandage from his leg on 18 March 2011 at George Mukhari Hospital.

[5] The plaintiff testified that on 16 March 2011 at approximately 14H00 he was with some seven (7) or eight (8) male companions at the scene of the incident, gambling dice and smoking dagga under a tree opposite a school. Some of his friends were standing and some were seated when the police alighted from the vehicle and started shooting at them. Some of his companions started running away; when he heard the sound of firearms being fired he looked and saw the police and he also ran away for his life.



[6] He testified that he saw two policemen, they had firearms but he does not know who of the two police officials fired shots. He didn't run for a long time (he indicated the distance to be approximately 20m) when he felt a bullet hit him on the leg, and he fell down. He felt severe pain and the police came and asked him why was he running away and they said to him that he had caused the injury himself by falling onto stones, and he informed them that that was not true but that they/the police had fired at him.

[7] He testified that after he had been shot he learnt from the community members who had gathered at scene that allegedly there were two school girls who were with the police who had alleged that they had been robbed by one of his group. He testified that the girls in question are known to him as Zodwa and Katulwane. That they knew where he resided, and he also knew where they resided.

[8] He testified that after the shooting he was taken to Odi Hospital where he was medically managed and treated when a back slab was applied and was then transferred to the George Mukhari Hospital. That on 18 March 2011 he tried to remove the bandages from his leg, and that the reason for doing so was because he was feeling severe pain; that other patients in the ward were complaining of a smell coming from his leg. The nursing sister found him trying to remove the bandages, and removed them. His leg was subsequently amputated.

[9] He testified that he was never arrested for robbery, never charged for an offence and there was never a police guarding him at his bedside.

[10] He was extensively cross examined by counsel for the Defendant. He amongst others stated that when the police were shooting he ran away because

he feared for his life; also that as he and his companions were gambling dice and smoking dagga they were afraid that he would be arrested.

[11] In the defendants' heads of argument, counsel for the defendants placed the following as contradictions and/or discrepancies in plaintiff's versions:

"[7.1]        *Exhibit A –*

*[7.1.1]        in terms of a founding affidavit to a notice of motion applying for condonation for failure to serve a notice in terms of Act 40 of 2002 he conveyed in this affidavit the following:*

- a) In paragraph 1.2 he stated: "The contents hereof fall within my personal knowledge, unless expressly otherwise stated, and are both true and correct".*
- b) In paragraph 4.10 he conveyed: "In annexure "JJM1", the respondent specifically was asked for leave to institute legal proceedings. I humbly refer the Honourable Court to paragraph 5 of "JJM1"."*

*[7.1.2]        He admitted that he made the statement and that annexure "JJM1" was annexed thereto. The contents of annexure "JJM1" therefore became part of his version under oath and in exhibit A, "JJM1", paragraphs 3.2 and 3.3 the following is conveyed:*

*“3.2 Two members/officials of the SAPS alighted from the vehicle and crossed the street towards the tree, approximately 10m from the road under which our client and his friends were sitting. Both the policemen were armed, one with a rifle and one with a side-arm. Without warning, whilst approaching, both policemen opened fire on everyone still sitting under the tree.*

*3.3 Everyone ran away except Mr Mgijima who threw his arms in the air and shouted to the policemen to stop shooting. They continued shooting and Mr Mgijima, fearing for his life started to run away. He ran approximately 5m and was hit with a bullet on the leg. The policemen stopped shooting and when they arrived at Mr Mgijima where he laid on the ground, they turned around and said to each other: ‘it’s not him’.”*

*[7.1.3] With regard to this version, despite being under oath the plaintiff stated that he never “... threw his arms in the air and shouted to the policemen to stop shooting”.*

*[7.2] Exhibit B1 and B2-*



[7.2.1] *It is clear from these exhibits, two further statements made by the plaintiff, that a further version is given as to what had transpired. In exhibit B1 he conveyed:*

*“Whilst sitting there I noticed a police marked vehicle, a sedan stopping next to us. Two policemen alighted from the said vehicle and cocked their firearms and the other policeman cocked the rifle.*

*I together with my friends ran for cover and we heard the cocking of firearms. As I was heading for the bush one policeman fired a shot at me. I fell a sting on my left leg and when I checked I noticed that I was shot.”*

*(Exhibit B1 was a statement made to the  
Department: Independent Complaints  
Directorate, Republic of South Africa)*

[7.2.2] *In exhibit B2 made to the investigating officer of the South African Police Service he conveyed:*

*“2. At about or between 14:00 and 15:00 a police van marked (Klipgat) arrived where we were sitting and two policemen inside. Without saying a word they alighted a vehicle, cocked the rifle they were handling.*

3. *Then we ran for cover as we heard riffle being cocked, as we were running I heard a shot being fired by those policemen. I fell to the ground and felt that I have been shot on the leg."*

[7.2.3] *In cross-examination he denied that it was the cocking of the rifles that caused him to run away and that that statement is incorrect.*

[7.3] *In the expert bundle the report by Prof Motsitsi (on behalf of the Third Party) is included and in that report (p.30 – 31) the history as narrated by the plaintiff is set out which is the following:*

*"The incident took place on 16 March 2011 at about 14:00. He was relaxing with his friends playing dices and smoking dagga. The police arrived at the scene accompanied by two ladies who alleged that they were robbed in the bush. The police were looking for the robbers. Suddenly without warning the police opened fire on the claimant and his friends. They ran away and the police kept on shooting. He was hit on the leg and fell. The accompanying ladies could not identify him as one of the robbers. Community members came to the scene and when they realised that the claimant was shot, they called the ambulance."*

*The version given to Prof Motsitsi appears almost similar to that given under oath in this Honourable Court except that clearly what*



*is depicted in the version to Prof Motsitsi is that when he ran away he was aware thereof that two ladies accompanied the police "... who alleged that they were robbed in the bush. The police were looking for the robbers."*

*[8.1] It is clear, so it is with respect submitted that this witness is an untruthful witness as to exactly what had transpired. In S v Oosthuizen 1982 (3) SA 571 (T) it was succinctly conveyed at 576B:*

*"Where one statement contradicts another, both cannot be true; one of them must be false."*

*[8.2] We have at least 4 versions on behalf of the Appellant."*

[12] Counsel for the defendant submitted that due to the discrepancies and/or contradictions between the plaintiff's evidence in court and what is stated in the letters previously written by his attorneys and/or various statements he/plaintiff previously made, the court should find that the plaintiff was an unimpressive and unconvincing witness, and is untruthful. I deal with this aspect below.

[13] It was submitted on behalf of the defendants that the plaintiff was 20% negligent in causing the police to fire shots. I must state that this was never even pleaded by the defendants in their plea and/or amended plea.

[14] Counsel for the defendants submitted that the plaintiff was negligently shot by the police, but that it was because of his [plaintiff's] action of running

away that he sustained the gunshot wound. Further, that because the plaintiff conceded under cross examination that the reason why he ran away was because they were gambling and smoking dagga and he was afraid of being arrested, that that is the reason why shots had been fired, that "he (referring to the plaintiff) laid the foundation for contributing (*sic*) negligence because of his behavioural conduct", that therefore an apportionment should be made.

[15] At the pre-trial conference the defendants' case was that the plaintiff ran away after he had been identified when the police approached him in relation to some alleged robbery he had allegedly committed. The defendants had responded as follows at the pre-trial conference held between the parties on 2 May 2017:

*"2.2 the defendants will rely thereon that the plaintiff was at the time of the incident identified by two lady learners as the person who had robbed them on 10 March 2011 from money, cell phones and stationery."*

*2.3 When Plaintiff appreciated that he had been identified where he was sitting gambling and smoking dagga, he ran away from the scene and in the process shots were fired and he was shot in the left lower leg and had therefore sustained a gunshot wound. " [My underlining]*

The nub of the defendants' case therefore was that the plaintiff ran away because he was sought for the alleged robbery and that when he saw the police he then ran away. It was never the defendants' case that the plaintiff ran away because he was gambling and smoking dagga. There is no evidence whatsoever under oath on the part of the police/defendants to



the effect that that 'the plaintiff was at the time of the incident identified by two lady learners as the person who had robbed them on 10 March 2011 from money, cell phones and stationery'.

[16] During the cross examination of the plaintiff by the defendants' counsel the plaintiff was asked, amongst other things, what steps he took to locate and secure attendance at court, of the two lady learners who allegedly had informed the police that they had been robbed by the plaintiff. Surely if the police wanted to rely on this version they are the ones who should have secured the attendance of the said learners at court to come and justify their/police's unlawful action. The plaintiff did not have a duty to secure the attendance of the alleged 'two lady learners' at court to come and prove the defendants' alleged version.

[17] In all his statements, made prior to the pre-trial conference, and prior to his trial, the plaintiff never shied away from the fact that he and his companions were gambling dice and smoking dagga when the police approached on the day of his shooting. And as already stated it was never even pleaded by the defendants in their plea and/or amended plea that the plaintiff was shot at because he was running away after he was found gambling dice and smoking dagga. Not even what the defendants say was the reason for shooting the plaintiff is pleaded. Running away from the police because the plaintiff was gambling dice and smoking dagga cannot be contributory negligence on the part of the plaintiff. From the evidence before court there is no evidence on which the court can come to this conclusion [that the plaintiff was contributory negligent].

[18] The plaintiff testified that he ran away because he feared for his life when the police were shooting. It cannot be said to be unreasonable to expect that one would run away when being shot at, let alone negligent in trying to preserve



one's life. He was asked why he was the only one struck by a bullet. The fact that out of the people (7 or 8 people) who ran away, only one person i.e. the plaintiff, was struck by a bullet, does not in any way make the plaintiff negligent. He was simply the unfortunate one that was struck by the bullet. There is no evidence on the part of the defendants to even dispute that it was not only the plaintiff who ran away when the police fired shots. Surely it cannot be expected that all those who ran away would have been struck by a bullet. There is just no merit at all in this argument on behalf of the defendants. The police were purely reckless and acted unlawfully in shooting the plaintiff.

[19] It is unreasonable for the defendants to expect that the plaintiff should have just stood still when the police fired shots. Even if it were to be accepted that the police may have only 'cocked' their firearms prior to plaintiff running away [there is no evidence under oath in this regard], it is extremely unreasonable to expect that the plaintiff should have just stood there and expect that the police would not shoot, not even knowing what was in the police's minds.

[20] There is no reason even proffered by the defendants why the police could not have simply chased the plaintiff [and his friends] without resorting to the use of firearms. The police were simply reckless in their conduct in unlawfully shooting the plaintiff without any reason whatsoever to do so. Nowhere was it even suggested, under cross-examination or otherwise, that the plaintiff posed any danger to the police and/or resisted any arrest, nor did the police resort to any measure other than shooting even if it were to be found that the plaintiff was suspected of having committed any crime; no evidence, as already stated above, was proffered under oath in this regard.

[21] The only evidence before court is that of the plaintiff. There may have been discrepancies between the plaintiff's evidence and statements and/or affidavit he previously made; such discrepancies and/or contradictions are not material in my considered view. It does not detract from the fact that the police unlawfully and recklessly without any lawful reason whatsoever shot at the plaintiff, causing the injuries he sustained which eventually led to him losing his lower left limb. One thread runs across all the versions placed on record by the defendants' counsel, and that is that the plaintiff and his companions were gambling dice and smoking dagga, the police came and started shooting, the plaintiff and his companions ran away; in the process the plaintiff was shot at and he sustained an injury to his leg. This is what is material, and there are no discrepancies in this regard.

[22] I listened to plaintiff giving evidence; I had the opportunity to observe his demeanour. I do not agree with the defendants' counsel that the plaintiff was an unimpressive and unconvincing witness, and is untruthful. In my view the plaintiff was an honest witness, he went to the extent of, from the beginning, under oath, admitting before this court that on the day in question, when the police approached, he was playing dice (gambling), which is illegal, and smoking dagga, which is also illegal; and that when he and his companions saw the police some of them started running. In his various versions which were placed on record by the defendants' counsel, the plaintiff mentioned/stated throughout in his statements that he and his companions were gambling dice, and were smoking dagga. He was honest from the beginning; and the court takes judicial notice of the fact that it happens many a times in the townships that when people are playing dice (gambling) or smoking dagga, they run away when they see police, obviously for fear that they might be arrested as they'd be engaged in unlawful conduct. The plaintiff came out as an honest truthful



reliable witness, and the court accepts his evidence. His demeanour in court was candid and impressive even during cross examination. He made a good impression on the court as a witness. He gave his evidence in a frank and straight forward manner, never creating any impression of exaggerating the events of the day. His evidence was consistent, logical and free of any inherent probabilities.

[23] From all the facts before court no contributory negligence can be found in the conduct of the plaintiff. The police were 100% to blame for the unlawful shooting that resulted in the injuries sustained by the plaintiff on 16 March 2011. The second, third and fourth defendants were in the employ of the first defendant and acted within the course and scope of their employment with the first defendant at the time of shooting the plaintiff. The first defendant is thus vicariously liable for the actions of the second, third and fourth defendants.

[24] In the result the 1<sup>st</sup> defendant is 100% liable for the plaintiff's agreed or proven damages.

[25] It was submitted on behalf of the defendants that the plaintiff contributed to the sequelae of his injuries in that he removed the back slab/bandages from his wound on 18 March 2011. That the court should therefore apportion 20% risk discount in this regard; i.e. that the first defendant be only 80% liable for the sequelae suffered by the plaintiff.

[26] The evidence of Dr Virginia Close (Dr Close"), which stands undisputed, is that the plaintiff's attempt to remove the bandages from his wound does not and cannot be said to have contributed to the sequelae of his injuries leading to the amputation of his leg, since at the time the plaintiff **attempted** to remove



the bandages the wound on the plaintiff's injured leg was already septic, to the extent that other patients in the ward were complaining that there was a smell/odour coming from plaintiff's injured leg. [My emphasis]

[27] The following is recorded by the hospital personnel in the hospital records, under **PROGRESS NOTE**

"18 March 2011 at 16H00

*The patient was found removing the back slab. When asked what was happening, he did not make sense about the report he was telling us. The wound was very smelly all the patients in the cubicle were complaining of the smell.*

***The back slab was then removed by the sister in the ward to remove the smelly bandages and access the wound. The wound was not bleeding anywhere but septic.** Dr Malete was bleeped, and this was reported to him, after the wound was dressed. He came in the ward and ordered another below knee back-slab, and called the operating doctor to operate the patient today since he is on speed list. He reports (sic) that the doctor operating says he cannot operate the patient today. The people from plaster room were called about application of back slab. (Mr Mkhabela) reported that they are closed and have knocked off, so the doctor must apply it himself. Dr Malele was bleeped and he reports he is not on call instead it is Dr Olowa who was then bleeped and not yet responded. Night staff gave the report."*

[28] The next entry from the hospital records is the next day, on 19 March 2011 at 13H05. The last note prior to the 18 March 2011 notes set out above was on 17 March 2011 at 17H05.

[29] From the recording in the hospital record aforesaid, it is clear that in fact it was the nursing sister in the ward who removed the back slab and the bandages from the plaintiff's leg, [unfortunately it is difficult to read the name/signature of the personnel, inscribed next to the notes]. At the time the back slab and bandages were removed already there was sepsis on the plaintiff's gunshot wound; the damage seems to have already been done, as testified by Dr Close. There is no basis upon which the court can find any contributory negligence on the part of the plaintiff in this regard.

[30] It was submitted on behalf of the defendants that the medical and nursing personnel at George Mukhari Academic Hospital contributed to the sequelae to the injury sustained by the plaintiff, leading to the below knee amputation of the plaintiff's leg. In the expert report by **Professor Motsitsi**, an expert on behalf of the third party, dated 15 April 2017, the following is stated at pages 38-39 of the report:

**"OPINION and Prognosis on the case.**

- ❖ **Summary of the case;** this gentleman suffered Grade 3B open fractures of the left tibia and fibula following a gunshot. He arrived at G M A H about seven hours after the injury. He was correctly diagnosed as a Grade 3B open fracture. Two clinical events were crucial in determining the outcome:

A. Prophylactic antibiotics: he was given cloxacillin. This is not the commonly used antibiotic. Patients are given cephalosporin as prophylaxis because they are broad-spectrum antibiotics. Cloxacillin is not a broad-spectrum antibiotics. The antibiotics are given until the patient is taken to the theatre for debridement. The antibiotics was given for two days. It is not clear from the clinical notes what was reason for stopping it.

B. Time taken to debride the wound: open fractures are a priority. Patients must be taken to theatre within 24 hours of injury. **This patient was taken to theatre about 79 hours later.** The wound was already septic. **He had developed gas gangrene. This is a fulminant/rapidly spreading infection with a high incidence of limb loss.** It also has significant mortality and morbidity. It is in my opinion that the two factors mentioned above are the cause of limb loss.

[31] From the opinion of Professor Motsitsi clearly the George Mukhari Academic Hospital and/or Odi Hospital medical and nursing personnel's conduct was negligent and also contributed to the sequelae to the injuries sustained by the plaintiff. Counsel for the defendant, Mr Phaswane, correctly conceded this much.

[32] Having regard to the totality of the evidence before this court I find that the first defendant, Minister of Police, is 100% liable for the damages suffered by the plaintiff.

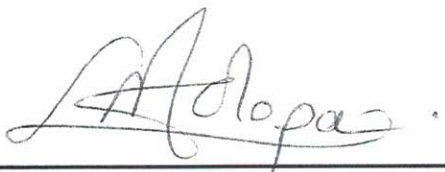
[33] Due to the conduct of the medical and nursing personnel at George Mukhari Academic Hospital and/or Odi Hospital, the third party, MEC for



Health, Gauteng, is obliged to indemnify the defendants for 50% of the damages suffered by the plaintiff, and is therefore declared liable for 50% of the damages suffered by the plaintiff.

[34] In the result an order is made in the following terms:

1. The first defendant is liable to compensate the plaintiff for 100% of the plaintiff's agreed or proven damages.
2. The third party, MEC for Health, Gauteng, is liable to the first defendant for 50% of the damages suffered by the plaintiff.
3. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on a High Court scale, which costs shall also include the costs of two (2) counsel as well as plaintiff's costs as far as the experts are concerned, including the costs of obtaining reports and the reasonable preparation, reservation and qualifying fees of Dr V Close.



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**L M MOLOPA-SETHOSA**  
**JUDGE OF THE HIGH COURT**