IN THE NORTH WEST HIGH COURT

MAFIKENG

CASE NO.: 1108/12

In the matter between:

SERETSE KINGSLEY MMOLAWA **Plaintiff**

and

MEC FOR HUMAN SETTLEMENT **1ST Defendant**

MODISANE AMIEL MANGOPE **2nd Defendant**

CIVIL MATTER

KGOELE J

DATE OF HEARING : 01 OCTOBER 2014

DATE OF JUDGMENT : 08 JANUARY 2015

FOR THE PLAINTIFF : ADV. S.J. SENATLE

FOR THE RESPONDENT : ADV. M.A. QOFA

JUDGMENT

KGOELE J:

A. INTRODUCTION

[1] The plaintiff, Kingsley Mmolawa, instituted an action for damages in an amount of R5000 000.00 that he allegedly suffered as a result of being shot by the second defendant, Mr Donald Mangope, a male traffic officer in the employment of the first defendant.

[2] The plaintiff alleged that the shooting was unlawful, alternatively negligent, and further that the second defendant was acting within the scope of his employment at all the material times when the shooting took place.

[3] By agreement between the parties the merits and *quantum* were separated and evidence was led on the merits only.

B. PLAINTIFF'S CASE

[4] The plaintiff's version is that on Saturday the 01st August 2009, he and his friends, Tirang and Obakeng, had stopped at or near Maitiso Tavern in Lehurutshe. They were in fact driving to Zeerust to test drive the new VW Red Golf ("**The Red Golf**") belonging to one of his friends. The reason for stopping at the tavern was to purchase a few drinks and to continue to Zeerust.

[5] He further testified that when the second defendant approached him, he was seated on the driver's seat with the engine of the car running whilst talking to a pedestrian who was standing on the window of his car. His car was parked partly on the road and partly on the pavement as its left wheels was on the pavement.

[6] The second defendant started accusing him of having parked wrongly. He tried to explain to him that he had not parked but waiting for someone from the Tavern, but the second defendant continued talking a lot telling him that this is not Gauteng. The plaintiff indicated that he was pleading for forgiveness from him but the second defendant did not listen and ended up taking the keys of his car from the ignition, put them in his pocket and walked away with them.

[7] The plaintiff approached the second defendant, pleaded with him to give him a ticket (written notice of the offence he committed) and giving him the keys back. According to the plaintiff the second defendant refused and said there is nothing that he (plaintiff) can do to him. Plaintiff then grabbed the second defendant with the aim of taking his keys from his pocket, a scuffle then ensued.

[8] The plaintiff admitted that he had consumed alcohol on that day but he indicated the alcohol consumed was not a lot and that he was still in a stable and sober condition. Plaintiff indicated that it was only during the scuffle with the second defendant that he realised that there were policemen around who had arrived at the scene.

[9] The second defendant then requested the policemen who had arrived to arrest him for having parked wrongly and assaulting him. After he had explained to those police officers the reason for the scuffle and that he was not assaulting the second defendant, the police officers indicated that both him and the second defendant must resolve their issues failing which they must then go to the police station. They did not arrest him at all.

[10] His brother Diphetogo arrived at that time with a black Corsa minivan. They both went to the toilet and when they came back, assuming everything was over, got into his brother's van and left the scene peacefully with the aim of going home. However, it was only when they had driven a distance of ± 4 kilometres that he realised that the second defendant was chasing them. He realised this because he and the other occupants of the car were seated at the back of the van without a canopy. The second defendant had his blue lights of his car on and was firing shots at their van at the same time.

[11] He pleaded with his brother who was the driver at that time to stop. He refused giving the reason that the defendant appeared to be drunk. A clear chase between their car and that of the defendant ensued for a long distance and both cars were now driven at a high speed. His brother finally stopped their car at their village home Gopane near a Lutheran church. The second defendant also stopped his car and approached their car.

[12] The plaintiff testified that after he alighted too and was on his way to the second defendant, the second defendant drew his service pistol and started shooting towards him without saying anything to him. He fired three shots at him and as a result he fell to the ground. The brother who was by then still in the car got out in order to assist him. An argument ensued between his brother and the second defendant, and he was thereafter taken to a nearby clinic. He could not be attended to at that clinic as his brother indicated that he found the second defendant who pointed him with a firearm and threatened to shoot him as well from inside the clinic when he was busy requesting for some help from the clinic staff.

[13] He was ultimately taken to a nearby hospital. He indicated that he became unconscious thereafter. He also indicated that when the blood was drawn from him at the hospital he was unconscious and did not give his consent. He was only shown the bottles containing the blood that was drawn from him by the doctor after he regained consciousness. He regained consciousness at the time he was being sutured. He denied having assaulted the second defendant with fists. He denied having throttled the second defendant at the scene of shooting nor even touching him. He further indicated that nobody from the car charged on him and/or attacked him at the scene of shooting. They were all still inside the car when he was shot at.

[14] During cross examination it was put to him that, *"evidence will be led that the police officer put you under arrest. You refused to go to the police station. A third person claiming to be your friend intervened and promised the police that he will take you to the police station with his car. They agreed. When the vehicles were about to leave for the police station, being in a convoy, the police officer's car being in front, your friend's car in the middle, the second defendant's car at the back, you quickly got out of your friends car, went into another van that was close by belonging to your brother, and you fled".* He vehemently denied all these and indicated that he never fled, and there was no friend of his who offered to take him to the police station with his car. The scuffle was over when he left with his brother in his van.

[15] Godfrey Menyatswe, a traffic officer who was a supervisor of the second defendant testified on behalf of the plaintiff as a second witness. He testified that he was at Maitiso Tavern on that day watching a soccer match as he was off duty. About ± 20 metres away

from him he saw the second defendant being surrounded by a number of people who seemed to be interested in what he was doing. He went nearer and the second defendant told him that he has a problem with a driver of the red Golf. The said Golf was disturbing traffic, as part of it was on the road. At that time the said driver he was referring to together with himself were holding each other with the collars. He then requested the second defendant to leave that driver (the plaintiff) to him to deal with seeing that there were many people around. The second defendant went to the Golf, grabbed the car keys and he threw them at him, someone from the crowd grabbed them. Seeing that the situation was becoming tense as the people surrounding them were making noise, he got into the vehicle of the second defendant and rushed to the police station for back up. When he came back with the police that were dispatched the situation was no longer tense. It appeared to him that the second defendant had managed to contain the plaintiff as he was holding him with his belt, and the number of people were also less, some already gone to watch the soccer match. He then went to join them to watch the soccer match. After an expiration of two hours, the second defendant phoned him telling him that he had shot a person. He became surprised. During cross examination he indicated that the second defendant did not tell him that the plaintiff was drunk, and that he wanted to arrest him. According to him there was nothing about arrest at that time. According to him the second defendant was supposed to have just given the plaintiff a ticket (summon) if he had wrongly packed. He further said that the second defendant did not tell him that the plaintiff assaulted him.

[16] The third witness that testified on behalf of the plaintiff was Mr Diphetogo Rodney Mmolawa. He is the younger brother to the plaintiff. He testified that on the day he also went to Maitiso Tavern together with Olerato Mokgatle. He was driving a black Opel Corsa belonging to the plaintiff. They arrived at the same time with a police van. He then noticed that his brother, the plaintiff, was held by a traffic officer with his belt. He then realised that his brother was in trouble because he and the traffic officer were surrounded by some people and the two seemed to be a centre of attraction. He went nearby to check what was happening. The traffic officer, whom he later discovered that it was the second defendant, told the police officers who were approaching also that he want them to arrest the plaintiff because he had wrongly parked and was assaulting him. Plaintiff then explained to the police that he was not assaulting him but merely asking that the second defendant issue him with a ticket and give back the car keys he took, and further that that was the cause of the scuffle between them. The police officers told them to talk to each other and solve the issue, and if they cannot, to go to the police station to report it. The second defendant moved away from the crowd and talked to somebody over his phone. According to him he heard him telling another person to come and arrest the plaintiff and lock him up so that he can be released on Monday. The situation according to him was calm at that time as he was no longer holding him with a belt. He then requested the plaintiff that they should go into the toilet of the tavern, and whilst there explained to him that the second defendant appears to have taken in liquor and that he wants him to be arrested for the whole weekend, they better leave and go home. Plaintiff gave the owner of the car its keys (Red Golf) and he climbed at the back of his

car (Black Corsa) with Tirang and Olerato and they went home. He (the witness) was driving the Corsa.

[17] They drove towards the direction of Gopane. When they had stopped at a T-Junction waiting for the other cars to pass so that they can join the road safely they then saw a blue light flashing coming at their back. When the car that was flashing the blue lights stopped at the T-junction they heard two firearm shots. He then decided to drive away because he became scarred as he did not know whether the occupant of that car was shooting at them or not. At the same time he realised that the occupant of that car was the second defendant. The chase continued for some time whilst the second defendant kept on shooting at them. When he realised that they were nearby home, and that the tarred road was going to end, he decided stop the car. By that time the second defendant was already driving parallel them. The second defendant came out of his car after stopping too, approached their car. He remained in the car seated and the occupants of the car as well were still at the back of the van. The only person that alighted was the plaintiff. Whilst the plaintiff was still approaching the second defendant, the second defendant fired a shot at the plaintiff. When he was busy coming out of the car the second shot was fired directed at the plaintiff again. A third shot followed. The plaintiff fell on the ground. He got in between them whilst the second defendant was pointing the firearm to the plaintiff who was lying on the ground. The second defendant warned him as well whilst he was retreating back that he will shoot him. He got into his car and drove away whilst they assisted the plaintiff who was now injured. They managed to take him to the clinic with the help of a car of one of the people from the village that gathered there after the firearm shots. At the clinic he went to look for

a stretcher, and unfortunately met with the second defendant who pointed him with a firearm again. He went back to the car and drove away to the hospital. They met with the ambulance on the way which took the plaintiff.

[18] He further testified that the second defendant shot the plaintiff without him saying anything to him. At that time the plaintiff was still approaching the second defendant. The plaintiff never throttled nor assaulted the second defendant at all. In fact according to him no one was attacking or attempting to attack the second defendant at that time. He denied them ever changing the driver's seat at some stage during the chasing and even spinning the car. He lastly testified that at Maitiso Tavern the two police officers did not see any reason to arrest the plaintiff that is why they left the plaintiff to go.

[19] Mr Ferdinand Mxolisi Majova testified as the fourth witness on behalf of the plaintiff. He testified that he is a police officer at Setlagole police station but on the day of this incident he met with the second defendant at the clinic in Gopane. The second defendant knew him as a police officer. He came to him and reported that he had shot a person, and the police had not yet arrived. He did not explain to him the circumstances how the shooting took place. He then accompanied him to the scene. Upon arrival he found the plaintiff injured and the other people were busy helping him. There were other people besides the ones helping him but were not many. He inspected the scene and saw two cartridges on the ground. The police officers from Motswedi Police Station arrived and took over from him as he was not on duty. He just remained standing by.

C. DEFENDANT'S CASE

[20] The second defendant, Mr Amiel Modisane Mangope testified as the first witness on behalf of the defendants. He testified that on the 1st August 2009 whilst on duty patrolling, he noticed a red vehicle having parked in the middle of road obstructing traffic. The driver thereof was busy talking to a pedestrian. He approached him and also put on his blue lights to warn the driver thereof of his presence but the driver ignored his warning. He alighted from his car, approached him and requested him to remove the vehicle on the way. He did not listen to him. He realised that he had taken in liquor as his speech was blurred and smelling alcohol. He decided to take the keys of the car according to their regulation not to allow him to drive further. Instead the driver thereof who was the plaintiff became very aggressive. He opened the driver's door to such an extent that it hit him injuring him in the process. He came out of the car in a fighting mood. A bystander who appeared to know him grabbed him and requested him to co-operate. He refused, approached him and hit him with a clenched fist. His spectacles fell to the ground in the process of being hit. He grabbed his hand to stop him from further assaulting him. He requested Mr Manaka, a traffic officer who was not on duty to call the police. When the police arrived he let go of the plaintiff as he was still holding him at that time. He explained to the police to help him arrest the plaintiff. The police asked him to go with them to the police station. He refused. Another gentleman who claimed to know the driver came and requested that he should be permitted to take the plaintiff with his own vehicle to the police station as he knows him. They all agreed. After they prepared the cars for a take-off to the police station, having moved for ± 6 metres, the plaintiff jumped out of the car of that

gentleman, got into the van, black in colour which was nearby and fled in it in a high speed.

[21] He gave chase to it. During the pursuit he phoned the police to inform that the plaintiff is driving away. After ± 15 – 20 km drive, the plaintiff's car turned to the road leading to Gopane. He continued chasing it with his blue lights on. At some stage, their car stopped and the plaintiff took over as a driver. This happened fast and the chase began again. At a certain cross-roads near the shops and taxis, the plaintiff spinned the car about seven times. He had stopped by then as there was nothing he could do. After this the plaintiff's car stopped again. When he approached the car on foot, the plaintiff started it and drove away. He followed it until it stopped next to a road. He stopped his car too, approached their car and the plaintiff also alighted from their own car. Plaintiff then said to him that he will show him that this is not "Velly" and started throttling him. He removed his hand from his throat. The other occupants of the car alighted from their car and approached him from different sides. He was able to remove his hand again when he was throttling him for the second time. When he was trying to throttle him for the third time, he threatened to shoot him, but he was not scared by this, he throttled him for the third time. He retreated, took his service firearm, and fired a shot to the ground to scare him, but he continued coming to him. He pointed a firearm to his feet, fired a second shot and he fell to the ground. The other people were at that time insulting him, shouting at him and pushing him on the sides. After ascertaining how he was injured, he went to the clinic to seek for help. Whilst phoning the police and the ambulance, he heard a commotion in the passage and a man busy shouting... "I will shoot". He then

produced his firearm and just pointed on the floor with it. The nurse managed to take that man out of the clinic.

[22] He went back to the scene and found that the police had already arrived. He denied having consumed liquor on that day. During cross examination it emerged that in his statement that he made seven days after the incident, he did not mention that the plaintiff throttled him thrice, but only said he attempted to throttle him. It also emerged in his statement that when he saw and started chasing a car that was driven recklessly he was busy patrolling at Gopane at 18h30. He responded by saying that is how they normally write statements. He denied having fired shots during the chase and indicated that he could not do so as he was driving in a high speed. It also emerged during cross examination that he did not lay a charge against the plaintiff of resisting arrest, assault at Maitiso Tavern and obstructing traffic, except that of reckless driving and driving under the influence of alcohol and assault at the scene, and he indicated that he only chose these two by virtue of the discretion vested in him. He further indicated that he could not write a ticket for the offence the plaintiff committed at Maitiso Tavern because the plaintiff's car was standing in the middle of the road obstructing traffic. He needed to remove it. The fact that he was attacked by both the mob and the friends of the plaintiff came for the first time during cross-examination.

[23] The defendant called Mr Tshekedi Manaka as its second witness. He testified that he was also watching a soccer match at Maitiso Tavern. He is also a police officer. When he went out of the tavern, he noticed a red Golf parking in the middle of the road, talking to a pedestrian. The second defendant requested him to move the vehicle out of the

road. The plaintiff ignored him. After parking his motor vehicle the second defendant went to him. When he reached the plaintiff's car, the plaintiff started having an argument with him. While they were arguing the plaintiff hit the second defendant with a fist. When he was about to separate them, another gentlemen came from the tavern and talked to the plaintiff, the second defendant asked him (the witness) to phone the police. He did so. After the police arrived they took over the situation and he went back into the tavern.

(24) During cross-examination it appeared that there were several things he did not mention *inter alia*:-

- That the engine of the plaintiff's car was running;
- That the second defendant took the plaintiff's car keys;
- The spectacles of the second defendant that fell away;
- That the group of people wanted to fight the second defendant, which fact is contained in the statement that he wrote himself;
- The fact that Mr Menyatswi took the second defendant's car to report at the police station.

His explanation was that he deemed all of this not necessary.

[25] The third witness for the defendants was Mr Isaac Molefe, who is also a police officer. He testified that he went to Maitiso Tavern after Mr Menyatswe came to request help from them when he was at the police station. Upon arrival the second defendant pointed at the plaintiff and reported to them that they should arrest him as he did not want to co-operate with him. His colleague Mr Kgosimere who had accompanied him at that time, informed the plaintiff and told him that they are

arresting him for not co-operating with the traffic officer. When they requested him to climb the police vehicle so that they can to go the police station he refused, saying his own car will take him to the police station. The second defendant pleaded with them for him to be brought by another person that volunteered to take him in his car which was standing nearby. After arranging how the cars will follow each other, they drove up until they got into a traffic circle. When they were about to take the road leading to the police station, it is then that they realised that the car in which the plaintiff was and that of the second defendant was not behind them. They saw the second defendant flashing his blue lights driving in the direction of Dinokana. They tried to chase after them but they returned at a T-Junction as they could not catch up with the two cars. When asked during cross-examination whether there was any other report other than the plaintiff being uncooperative that the second defendant told them, he said that there was none except that he told them to take the plaintiff to the police station. It was only when he was asked whether there was no report that the second defendant was assaulted by the plaintiff, that he now mentioned that there was that kind of report but he forgot to mention it. He initially said they were two in number when they went to help. But when it was put to him that the second defendant said they were three, he then agreed to this fact, it was shown that in his statement he only mentioned Mr Kgosimere. He then said it is because he forgot the third one. He also conceded that he forgot to testify that when he arrived at the scene, plaintiff and the second defendant were having a scuffle with each other.

[26] The defendants called Dr Charles Chidiehere as their fourth witness. He is the doctor that took blood from the plaintiff at the hospital. He

testified that he was requested by the police officer to take blood from the plaintiff following allegations that he consumed alcohol. He denied that plaintiff was unconscious when he took his blood and indicated that normally they cannot do that especially for case of drunken driving, unless it is for emergency medical attention.

[27] Mr Olebogeng Reuben Moraka, a senior police officer, who testified that he was an overseer of the Detective Branch in Motswedi Police station, was the defendant's fifth witness. He testified that after receiving a report about a shooting incident in Gopane he proceeded there. He found Warrant Officer Mokgatle and Leteane in company of the second defendant at the scene. He then disarmed the second defendant by taking his firearm, which was used in the incident. It had two live rounds in it. He was furthermore given two cartridges by Warrant Officer Mokgatle. He handed the firearm and all what he received to the Community Service Centre so that they can be sent for ballistic testing. He also mentioned his visit to the hospital to check the injured person. He explained how he found the plaintiff and how he was negatively received by the plaintiff and his father. During cross-examination it emerged that he did not ask the second defendant how the incident happened as he appeared to be still frightened. He also indicated that at the scene he did not take the spare magazine the second defendant said he was having in his car, he did that only after they had arrived at the police station. He enquired about it from him because he knew that they normally carry two magazines. He further conceded that he did not mention the second magazine in his statement as well and gave a reason that because it was not used, he didn't think that it was important to mention. He was made aware of the fact that the second defendant said he is the only one that counted

the number of the bullets in both magazines and no one else, and he vehemently disputed this fact. He also conceded that he did not verify how many bullets all-in-all the second defendant was given and how many did he return back when he disarmed him.

D. EVALUATION OF THE EVIDENCE

[28] It is common cause that there was a confrontation between the plaintiff and the second defendant at Maitiso Tavern, in Lehurutshe, and the second defendant ended up taking the keys from the vehicle the plaintiff was seated in. The plaintiff's version is that they only had a scuffle over the keys whereas the second defendant indicated that in addition to the scuffle, the plaintiff hit him with a fist. The police officer who was watching soccer, Mr Manaka, corroborated the second defendant as far as the assault is concerned. The plaintiff is therefore a single witness as far his denial that he did not assault the second defendant at all because, his witnesses, Mr Menyatswe together with his brother Diphetogo, arrived at the scene when they were already holding each other. They did not witness how the scuffle started and the assault. Cautionary rules are therefore applicable as far as this part of the plaintiff's evidence is concerned.

[29] It is furthermore not in dispute that the police were summoned to the scene at Maitiso Tavern. The plaintiff's version was corroborated by his two witnesses he called that the number of police that arrived from the police station were only two. The second defendant's version is that they were three in number. The police officer Mr Manaka who testified on his behalf instead corroborated the plaintiff's version that they were two. As already indicated above Mr Molefe, one of the

police officers from the police station could also not corroborate the second defendant on this aspect, as he gave two versions on it.

[30] It is further common cause that the second defendant chased the car in which the plaintiff was from Maitiso Tavern in Lehurutshe to Gopane Village which is ±40km from Maitiso Tavern. The plaintiff and the second defendant differ as to how the chase started.

[31] It is also common cause that the second defendant shot the plaintiff on his thigh at Gopane village. The reason for the shooting is hotly contested and it is the main issue in this matter. The plaintiff alleged that the second defendant was acting intentionally, unlawfully alternatively negligently when he fired the shots at him. On the other hand the second defendant alleged that he was justified in firing the shots at the plaintiff as plaintiff was fleeing the arrest, he had assaulted him previously at Maitiso Tavern and he was furthermore acting in self-defence as he was still being attacked by the plaintiff and his friends at that particular time of the shooting.

[32] The technique generally employed by Courts in resolving factual disputes where there are two irreconcilable versions before it is trite and need not be re-stated.

[33] Except the issue of the assault with a fist, it is quite apparent that the evidence of the plaintiff as far as the scuffle between the two at the Tavern is corroborated in some greater extent. Firstly, Mr Menyatswe corroborated the plaintiff's version that he was not parked in the middle of the road but with his vehicle wheels partly on the road and partly on the pavement. As indicated above, Mr Menyatswe and the

defendant's own witness, Mr Manaka, including his brother Diphetogo, also corroborated him on the aspect that only two police officers came from the police station. The brother of the plaintiff, and Mr Menyatswe corroborated the plaintiff further by testifying that immediately after the police arrived, the situation became calm, as the second defendant was no longer holding the plaintiff with his belt. Further that, there was no reason to arrest the plaintiff at that time.

[34] According to the second defendant, his spectacles fell off when he was hit with a fist by the plaintiff. His witness Mr Manaka, although he claimed to have seen the hitting with a fist, his version is that the spectacles fell at the time when the two were holding each other, when plaintiff was trying to release himself from the second defendant. His evidence rather corroborates the plaintiff's version on this aspect instead that the spectacles fell during their scuffle.

[35] Lastly his brother, corroborated him as to the issue that they got into the vehicle and then drove away and did not flee or ran away from the scene as the defendant's version suggest. It therefore becomes apparent that as far as the incidents at Maitiso Tavern is concerned, the only criticisms that can be levelled is that the plaintiff's version to the effect that he did not assault the second defendant could not be corroborated at all.

[36] When his evidence is compared with the evidence of the second defendant on the events at Maitiso Tavern, one finds that the second defendant's version is the flip side of the coin. The only corroboration which was found relates to the issue of hitting with a fist. The rest as to

how the events unfolded is riddled with a lot of contradictions. The following can be cited:-

- Mr Manaka said that there were no cars on the road, they were instead parked next to the road when the plaintiff's car was parked in the middle of it at the time the second defendant was talking to him, whereas the second defendant said there were some cars on the road and his car was obstructing a flow of traffic;
- Second defendant testified that when plaintiff went out of his car, the door thereof hit him. Mr Manaka denied this, he in fact said he did not see it when according to him he was at a distance where he could be able to hear all what was said and see all what was happening from them;
- The contradictions about when the spectacle fell and that of how many police officers arrived from the police station had already been dealt with above and need not be repeated here;
- According to the second defendant, when the plaintiff left Maitiso Tavern, the police had already arrested him, which fact was denied by Mr Molefe, one of the police officer who were summoned to Maitiso Tavern;
- According to the second defendant, when the plaintiff ran away, the cars that were supposed to go to the police station, including the one that plaintiff was in, had already moved a distance of ±6 metres from the place where the incident took place. The testimony of Mr Molefe is that the plaintiff's car followed them for ±3 km. It took a different route after all the cars had entered into the traffic circle. There is a striking vast difference between these two estimates from the two police officers;

- Mr Molefe also testified that only three cars were at the scene when they were preparing to go to the police station whereas the second defendant testified that there were four cars, and the plaintiff jumped into this fourth car when they were leaving the scene.

[37] Besides these contradictions, Mr Manaka and Mr Molefe, although they are police officers, were not impressive witnesses in the box at all. As indicated earlier, they left many important aspects of their versions up until they were cross-examined. This aspect had already been dealt with in the summary of their evidence and will not be repeated. Mr Molefe was the worst of the two. It came out during cross-examination that he adapted his version as and when questioned about an aspect that the second defendant testified about that he did not mention. He could not even admit to simple concession when he was supposed to.

[38] As far as the chasing up until the place where the shooting took place is concerned and the shooting itself, the plaintiff's evidence is materially corroborated by his brother to the effect that the second defendant fired three shots at the time he was still approaching the plaintiff, that the other occupants including him were still in the car and lastly that, no one attacked him at that time. On the other hand, the evidence of the second defendant is that of a single witness. Cautionary rules are therefore applicable. There were no criticisms levelled by the defendant's counsel as far as the plaintiff's version of events on these aspects except to say that the plaintiff and his brother were sort of exaggerating. Despite the absence of criticisms from the

defendant, this Court will not lose sight of the fact that they are brothers.

[39] Besides being a single witness, the second defendant's evidence on this aspect of the incident is also riddles with contradictions. His statement made by him indicates that he was patrolling at Gopane village when he sported the plaintiff driving recklessly and or negligently and furthermore, spinning on the road. His evidence in chief is that he was patrolling at Lehurutshe near Maitiso when the incident started. He did not mention the throttling in the statement that he made to the police at Lehurutshe Police Station, only attempted throttling. He himself testified under oath that he was throttled thrice by the plaintiff immediately before he shot him. His defence counsel put it to the plaintiff that he (the plaintiff) was so drunk that he could not appreciate what he was doing. When asked how was the plaintiff able to drive the car in such a high speed and spinning about ±10 times at the same time whilst he was hopelessly drunk, he then indicated that although the plaintiff was drunk he could still appreciate what he was doing. His statement also contradicted his *viva voce* evidence as far as the number of times the plaintiff allegedly spun his car. His defence counsel indicated that the plaintiff will say that he in fact directed the warning shots at the legs of the plaintiff, whereas he denied this fact and said that he directed it towards the ground. His defence counsel said during cross-examination that the second defendant shot deliberately at the plaintiff with the intention to stop him from fleeing and so that he can be able to arrest him. The second defendant *viva voce* evidence is that he shot in self-defence. According to the defence counsel, the second defendant had two magazines in his possession and 13 bullets in total. There were 10 bullets in a

spare magazine and the other one had 3 bullets. Furthermore, only 2 cartridges were found as an indication that the second defendant only fired 2 shots. Mr Moraka, the senior officer who disarmed the second defendant said that he did not count the number of bullets in the spare magazine. But the magazine that was in the firearm which the second defendant used had 2 live bullets or rounds and he was given 2 empty cartridges found at the scene of shooting. The second defendant testified that nobody except him counted the bullets he had in both magazines on that day when he handed in the firearm. Mr Manaka denied this.

[40] The last mentioned contradictions put the last nail in the coffin of the second defendant's credibility. It is furthermore the crux which the version of the second defendant rested upon and also where it started to crumble. The gist of these contradictions deal with a correct calculation of the number of bullets the second defendant used. A proper reflection of his version is that, this Court is not versed with how many bullets were there in the firearm that was involved in the incident. Simple arithmetic dictates that if the second defendant fired only two shots and two cartridges were found on the scene, then the magazine which was in the firearm should be left with one live bullet / round according to his own version and that of his counsel. But according to Mr Moraka, two live rounds remained, in that same magazine. As to how that happened is a mystery to the law enforcement officer Mr Moraka, and to this Court as well.

[41] Another disturbing feature about this evidence of the two enforcement officers is that, the senior one, Mr Moraka, does not take both magazines at the scene when he disarmed the junior one, the second

defendant. He conveniently forgets to ask about it when he so disarmed him, and only ask about it sometime after they had arrived at the police station. He furthermore does not still retrieve it, count the number of bullets therein, when he knew that if you are a law enforcement officer, when you return a firearm, or a firearm is taken from you, one has to account as to the total number of bullets booked out with the firearm and the number of bullets used and returned with it. This information is not necessary for administrative purposes only, but it serves as a tool for law enforcement officials to account for their actions. But most importantly, in the context of this matter, it is crucial to assist this Court in assessing the credibility of the second defendant and his witnesses and the reliability of their evidence as far as the issue of the firing of bullets is concerned which is the main issue before this court. It is also a missing link in the evidence of the second defendant. Unfortunately it lent credence to the plaintiff's version that not only two bullets were fired during the incident but more than two.

[42] All of the above considerations clearly indicate that, the evidence of second defendant together with that of his police officers witnesses, in exclusion of that of the doctor, cannot be relied upon. These finding will also become much clearer later in this judgment.

[43] The probabilities and improbabilities from the total evidence led, weigh heavily against the version of the defendants. From the second defendant's evidence, the plaintiff was uncooperative, violent because he assaulted him. He was furthermore drunk and obstructing the traffic flow with his car, that is why he needed help from the police station so that he can be arrested. Despite this, the plaintiff was not arrested even though two police officers were posted to help him do that.

According to them he (the second defendant) agreed that he be taken to the police station by his friend (Plaintiff's friend), who was at that time unknown to him. This conduct of the second defendant does not depict a conduct of a person who was under threat and seriously wanted to arrest the plaintiff.

[44] What aggravates the situation is that the two police officers who were there to help, could not help because, they could not arrest the plaintiff as they were requested. They also failed to assist the second defendant when the plaintiff allegedly resisted arrest and ran away. They furthermore did not assist the second defendant to apprehend the plaintiff when he gave chase to the plaintiff despite them having a vehicle that they could use to give chase. All of this occurred when it was allegedly reported to them that plaintiff was aggressive, drunk and had further assaulted a traffic officer.

[45] I find it highly improbable that the plaintiff who was on that day aggressive and resisted arrest as they alleged, could not be arrested by the three police officers together with two traffic officers who were on the scene at Maitiso Tavern despite the fact that he was not armed. If he was that aggressive and violent, Mr Menyatswe and Mr Manaka could not have left the situation and proceeded to watch the soccer match. As law enforcement officers they are expected to assist even if they were not on duty if the situation so demands. The conduct of all these law enforcement officers strengthen the version of the plaintiff that the situation when the police arrived was no longer tense, and furthermore that the second defendant was told together with the plaintiff that they must solve the argument they had because there was no danger posed by the plaintiff and furthermore, no reasons to arrest

him at that particular time. Otherwise, their conduct on this day would have amounted to a total dereliction of their duties.

[46] The van the plaintiff was travelling did not have a canopy. The second defendant also confirmed that there were other occupants at the back. I find it highly improbable that the occupants of the car could have managed to survive the spinning of the car ± 10 times and also came out unscathed, let alone fell from the van.

[47] I find it also highly improbable that the plaintiff could have managed to drive safely with such high speed, and even spin the car the number of times described by the second defendant if he was that drunk as it was alleged. The probabilities favours the version as put by the plaintiff if one has to believe the defendants' version on this aspect, that the brother of the plaintiff was the one who was driving the car during the chase, not the plaintiff himself.

[48] The probabilities further points towards the fact that the second defendant fired more than two shots during this incident that's why the number of bullets that were in his possession on that particular day cannot be accounted for by himself and Mr Moraka, a senior police officer, Colonel by rank, whose role in this matter was solely to disarm him. Conveniently this important piece of evidence cannot be found even in the statement of the Senior Officer, Mr Moraka. Under the circumstances, the version of events as described by the second defendant cannot be relied upon and is rejected by this court.

E. THE LAW

[49] It is trite that the plaintiff in the matters of this nature bears the onus of proof on a balance of probabilities. However, the defendants have admitted the shooting of the plaintiff. Thus the defendants bear the onus of proof in so far as justifying the shooting is concerned. This is based on the fact that it is trite law that any infringement of bodily integrity of another is *prima facie* unlawful, as a result, once such an infringement is proved, the onus is on the alleged wrong doer to prove grounds of justification.

[50] Section 49 of the Criminal Procedure Act 51 of 1977 (**CPA**) provides that:

"49. 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."

[51] Before conduct maybe statutorily justified, the defendant must prove on the balance of probability that he/she complied with the following requirements.

- That he was authorised by the Criminal Procedure Act to arrest or assist in the arrest of the person who had been assaulted;
- That he made an attempt to arrest the injured person – he must have actually made an attempt to deprive him of his freedom in order to secure his presence in court not to punish him;
- That the injured person had resisted arrest and could not be taken into custody without the use of force or that the injured person had fled whilst it was clear to him that an attempt was being made to arrest him and that such flight could not be prevented without the use of force;
- That the force which was used to overcome resistance or to prevent the flight was reasonably necessary and proportional in the circumstances;
- That the suspect has posed a threat or danger of serious physical harm. (**Ngubane v Chief Executive Director of Emergency Services eThekwini Metropolitan Service & another [2012] JOL 28559 (KZD) para 12**):

[52] In determining the proportionality of the force used by the defendant is also important to consider the threat posed by the plaintiff to the defendant or to society, but it is not the only factor to be considered. (**Govender v Minister of Safety and Security (342/99) [2001] ZASCA 80 (1 June 2001) para 17 and S v Walters 2002 (2) SACR 105 (CC))**

[53] **Olivier AJ**, in **Govender v Minister of Safety and Security (342/99) [2001] ZASCA 80 (1 June 2001)**, made the following finding regarding the test for proportionality:

"[19] Should this approach be adopted in determining the test for unlawfulness in our law in respect of the interpretation of section 49 (1) of the Act? I am of the view that it must. It seems to me to represent a rational and equitable way of balancing the interests of the state, society, the police officers involved, and of the fugitive. It represents, in the final instance, a proper mechanism for balancing collective against individual interests. It is, in my opinion, far better than simply weighing up the seriousness of the offence against the degree of force used, because the latter does not adequately protect the interest of the fugitive, nor does it sufficiently define the circumstances in which police officers in the interests of society are permitted to use force. Is it really appropriate or equitable where an offence committed or presumably committed is of a serious but non-violent nature, eg fraud, to allow a police officer to use potentially lethal force, such as the firing of a shot, at the suspect who is endeavouring to escape and who is unarmed and poses no immediate or foreseeable physical threat to anyone? Or the converse : can it be said, that if the offence is of a non-serious or non-violent nature, but the suspect is armed and poses a threat to the police officer concerned or other citizens, that potentially lethal force may not be used?

[20] Tennessee v Garner dealt with the use of deadly force in the sense that the plaintiff's son in that case was killed. But would any other test have been logical or valid if the son had been injured and not killed? The firing of a shot at a suspect is potentially fatal, and the lawfulness of the act does not depend on the more or less fortuitous result thereof. The question, whether the suspect posed a danger of the kind described, would be, in my view, equally apposite in the wounding of a suspect.

[21] I am of the view that in giving effect to section 49 (1) of the Act, and in applying the constitutional standard of reasonableness the existing (and narrow) test of proportionality between the seriousness of the relevant offence and the force used should be expanded to include a consideration of proportionality between the nature and degree of the force used and the threat posed by the fugitive to the safety and security of the police officers, other individuals and society as a whole. In so doing, full weight should be given to the fact that the fugitive is obviously young, or unarmed, or of slight build, etc, and where applicable, he could have been brought to justice in some other way. In licensing only such force, necessary to overcome resistance or prevent flight, as is 'reasonable', section 49 (1) implies that in certain circumstances the use of force necessary for the objects stated will nevertheless be unreasonable. It is the requirement of reasonableness that now requires interpretation in the light of constitutional values. Conduct unreasonable in the light of the Constitution can never be 'reasonably necessary' to achieve a statutory purpose.

[22] Applying this broader approach, I am of the view that the shooting of Justin was unlawful. If one were to apply the test of proportionality between seriousness of the offence and the force used, it may correctly be said that the theft of a motor vehicle is a serious offence and having regard to the high incidence of this offence in our country, one that should be combatted vigorously. Against that, the use of a firearm to shoot at another person is also a serious, inherently lethal, matter. But it is when the broader approach of proportionality between the threat posed by the fugitive and the degree and nature of the force used, is applied, that the scale is tipped in favour of Justin. He was unarmed and Cox did not see a weapon in his possession. He was 17 years old and it must have been obvious to Cox, when he commenced the pursuit of the fugitives, that they were mere youths. There was no allegation of hijacking, assaults or other acts of physical violence having been perpetrated by Justin or the other passengers in the car. Nor was there any threat or danger to the police or members of the public. Under these circumstances, what interest of society

was so pressing that it justified the violation of Justin's physical integrity? Can it be said that in our law the protection of property (via the criminal law system) is invariably more important than life or physical integrity? Surely not. It has not been shown by the respondent, on whom the onus rests, that the identity of the occupants of the stolen vehicle could not have been established by proper investigative procedures, eg fingerprinting of the vehicle, eye witness accounts of the theft, etc.

[23] Can section 49 (1) of the Act reasonably be interpreted to encompass the approach discussed above? I am of the view that it is eminently possible. The section includes the test of reasonable necessity. That test was already given a wider meaning by this Court in Matlou v Makhubedu, supra, viz proportionality between the force and the crime committed. It does no violence to the section to interpret it so that the 'threat' or 'danger' approach is included - and in my view that should be done."

[54] If the evidence shows that any of the requirements of section 49 of the CPA have not been complied with, the defendant cannot successfully rely on section 49 of the CPA. However, the defendant's conduct may still be justified on the ground of self-defence. (**Ngubane v Chief Executive Director of Emergency Services eThekwini Metropolitan Service & another [2012] JOL 28559 (KZD) para 17**).

[55] The onus of proving that an assault was not unlawful because it was justified by the exigencies of the situation rests upon the defendant. An assault is *prima facie* an aggression upon the plaintiff's rights of personality and as such unlawful unless it is justified. (**Sayed v Potgieter [1979] 2 All SA 52 (N)).**

[56] In **Ntsomi v Minister of Law & Order 1990 (1) SA 512 (C) at 526G–H**, the requirements to be satisfied before a plea of self-defence is upheld were summarised as follows:

"(a) There must have been an unlawful attack or threatened attack and the victim must have reasonable grounds for believing that he was in physical danger;

(b) The means of defence must have been commensurate with the danger and dangerous means of defence must not have been adopted in some other reasonable way."

[57] The same test is applied in cases of self-defence as in cases of attempted arrest. There must have been actual presence of imminent danger, a reasonably apparent of necessity of taking the action taken. (**R v Konning 1953 (3) SA 220 (T)**).

[58] The defendant must prove the following requirements in order to satisfy the onus of proving self-defence (**Snyman Criminal Law 4th edition page 112**):

The attack

- The attack must be unlawful
- The attack must be directed at an interest which legally
- deserves to be protected
- The attack must be imminent but not yet completed

The defence

- It must be directed against the attacker
- The defensive act must be necessary
- There must be a reasonable relationship between the attack and the defensive act

[59] The test for self-defence is an objective test. Snyman points out the following regarding the test for self-defence:

> "The court should then ask itself whether a reasonable person would also have acted in that way in those circumstances. A person who suffers a sudden attack cannot always be expected to weigh up all the advantages and disadvantages of his /her defensive act and to act calmly"

[60] In **Mugwena v Minister of Safety and Security 2006 (4) SA 150 (SA) at 158**, the court held that private defence must be determined by

asking whether a reasonable person would have been of the opinion that a real risk of death of injury was threatening.

[61] In the case of **S v Makwanyane and another 1995 (3) SA 391 (CC) at 448H–449A Chaskalson P** said the following:

> "Self-defence is recognised by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. This is consistent with s 33(1). To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life. The same is true where lethal force is used against a hostage taker who threatens the life of the hostage. It is permissible to kill the hostage taker to save the life of the innocent hostage. But only if the hostage is in real danger. The law solves problems such as these through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim, and favouring the life or lives of innocents over the life or lives of the guilty. But there are strict limits to the taking of life, even in the circumstances that have been described, and the law insists upon these limits being adhered to"

F. APPLICATION OF FACTS TO THE LAW

[62] Assuming for a moment that the plaintiff assaulted the second defendant and was fleeing from arrest and furthermore, attacked him at Gopane where the shooting took place, which fact I do not find, the question that need to be answered is whether the second defendant justified in shooting the plaintiff. In my view there were various options that were available for the second defendant to bring the plaintiff to justice if in the first place he was parking obstructing traffic. He could have issued a written warning to appear (ticket) as it normally happens. If he was drunk, as he alleged, he should have insisted and allowed the police officers who were called to put him in their police van to affect arrest as he had assaulted him on top of these two offences, instead of him allowing a third who was unknown to him to take the responsibility for that.

[63] There was furthermore enough chance for the second defendant to have taken the registration number of the car that was according to him running away with the plaintiff whom he wanted so dearly to arrest, as according to him it stopped twice during the pursuit, that is, when it was spinning and when they were changing as drivers. It was again at that particular moment opportune enough for him to have fired the shots at the vehicle's wheel to stop this vehicle from further running away. He could not explain why he did not opt for all of the above let alone give reasons why he dismissed these options. It has also not been shown by the respondent on whom the onus rest, that the identity of the occupants of the car including the plaintiff could not have been established by other proper investigative procedures, e.g. registration number of the car, eye witnesses etc.

[64] The plaintiff was not armed. The same applies to the other occupants of the car. The second defendant is on the other hand a trained law enforcement officer. As to why he did not fire a warning shot into the air at the time immediately after alighting from his vehicle at the shooting scene as the other occupants of the car and the other people whom he referred to as a mob were not there at that time remains unanswered. The evidence before this court that was not disputed is that he was the first to alight from his car and approached the car the plaintiff was in. He instead waited for the plaintiff to get out of the car and worse, approached the plaintiff when according to him was so violent, and he, the second defendant was alone at that time. All of these clearly indicate that he intended to shoot the plaintiff, and that is why according to him he opted to wait and shot a warning bullet to the ground, amidst of many people surrounding him, pushing him at the same time. It still remains a mystery how the defendant managed to

do this when according to him so many people were attacking him. Otherwise, how else was he intending to arrest the plaintiff at that particular time being alone when he failed to do so at the time when they were five in number at Maitiso Tavern?

[65] Assaulting a person is a serious offence especially if the assault is directed at a law enforcement officer. Against this, the use of a firearm to shoot at another person is also a serious, inherently lethal matter as Olivier AJ said in the Govender case *supra*. The consideration I have made in the paragraphs above tips the scale in favour of the plaintiff when evaluating the proportionality between the nature and degree of the force used together with the threat posed by the plaintiff to the safety and security of the second defendant. It is therefore clear that the second defendant failed to satisfy the requirements of Section 49(2)(a) and (b) of the CPA even if we can accept his version of the story. His conduct cannot in my view be statutorily justified. It is obvious from the evaluation of the evidence above that the conduct of the second defendant was totally unreasonable. The evidence that this Court accepted is that the plaintiff was not parked in the middle of the road. He was furthermore not drunk as the second defendant described. When he left the scene in the company of his brother and his friends the situation at Maitiso Tavern needed no arrest upon the person of the plaintiff. A simple written notice was sufficient to bring the plaintiff to book as Mr Menyatswe testified. It therefore became apparent that the second defendant had no reason to chase the plaintiff for such a long distance for the type of offences he could have brought him to justice in other available ways. The alleged assault at the Tavern was long over even if we can accept his version of his story. As proof of this, these offences of obstructing a traffic, being at

the back of the steering wheel of a car drunk and the assault Maitiso Tavern were never laid against the plaintiff, but only assault at the shooting scene and reckless driving was, despite being the offences that caused the whole fracas and furthermore the ones the second defendant wanted to arrest him for.

[66] The evidence further proves that at the time of shooting there was no imminent attack or real attack on the second defendant that warranted him to fire three shots at the plaintiff when he was still approaching him, and when the other occupants were still inside the vehicle. There was therefore no reason at all for the second defendant to shoot at the plaintiff at that time. Once again even if we can assume that the plaintiff was at that time attacking the second defendant, the force used was in the circumstances of this matter not commensurate with the plaintiff's attack when he was unarmed and allegedly drunk at that time. The defence cannot assist the second defendant. The defendants therefore failed to discharge the onus rested upon them on this defence as well.

G. ORDER

[67] Consequently the following order is made:-

68.1 The first and second defendants are held liable for 100% of the damages the plaintiff will be able to proof;

68.2 The first and the second defendants are ordered jointly and severally, the one paying the other to be absolved, to pay the costs occasioned by the adjudication of this action.

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A.M. KGOELE
JUDGE OF THE HIGH COURT

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