

SOUTH AFRICA / JUDGMENT

# Lehlela v Minister of Police

## (13151/2014) [2022] ZAWCHC 235; [2023] 1 All SA 438 (WCC) (17 November 2022)

[2022] ZAWCHC 235

## COURT

Western Cape High Court, Cape Town

## BEFORE

J I Cloete

## CASE / FILE NUMBER

13151/2014

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### Source record

## FLYNOTES:

NECESSITY AND POLICE RUBBER BULLETS

Delict –

Necessity – Plaintiff injured by police rubber bullet –

Police hopelessly outnumbered and not having  
access to other means

of crowd control – Justified in firing rubber bullets –

Plaintiff voluntarily assuming

risk by walking in area of protest.

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

no: 13151/2014

In

## the matter between:

DIBAKISO

ALLETA

LEHLEHLA

Plaintiff

and

THE

MINISTER OF POLICE

Defendant

## Coram:

Justice J I Cloete

Heard: 2, 3, 4, 8 August 2022 and 13 September 2022  
Delivered  
electronically: 17 November 2022

## JUDGMENT

CLOETE J:

### Introduction

[1] The plaintiff claims damages from the defendant of R2.7 million arising from an incident that occurred on 10 August 2011 in Grabouw. At commencement of the trial the merits and quantum were separated (by agreement) and accordingly I am only required to determine the merits at this stage.

[2] In her particulars of claim the plaintiff alleged that on the day in question, at approximately 6.15am, near the corner of Old Cape and Industrial Roads, Grabouw, she was ‘wrongfully, unlawfully, alternatively maliciously, alternatively further negligently, and without just or probable cause’ shot in the right eye by members of SAPS[1] acting in the course and scope of their employment with the defendant, and who: (a) failed to handle their firearm(s) with

proper consideration for safety of members of the public; (b) failed to properly handle a firearm(s) loaded with ammunition (rubber bullets); and (c) failed to avoid the shooting of the plaintiff when by the exercise of reasonable care ‘he/she/they’ could and should have done so.

[3] It is common cause on the pleadings – and I quote verbatim –

that at all material times the ‘said’ SAPS member(s):

3.1 were obliged by the preamble and s 14 of the South African Police Service Act (“SAPS Act”)[2] to ensure the plaintiff’s safety and security, and uphold and safeguard her fundamental rights as guaranteed by Chapter 3 of the Constitution, including her right to dignity, life, freedom and security, as set out in s 10, s 11 and s 12 thereof;

3.2 were obliged, by virtue of the SAPS Code of Conduct[3] to create a safe and secure environment for the plaintiff, to prevent action(s) which might threaten her safety or security, uphold the Constitution and the law, render a responsible and effective service of high quality, utilise all available resources responsibly,

efficiently and cost-effectively to maximise their use, uphold and protect the plaintiff’s fundamental rights, act transparently

and in an accountable manner, and exercise the powers conferred upon them in a responsible and controlled manner;[4] and

3.3 accordingly owed the plaintiff a duty of care, pleaded in the following specific terms: (a) not to abuse their power(s);

(b) not to act with deliberate or negligent indifference to the plaintiff's health and safety; (c) to exercise control of their actions; (d) to provide the plaintiff with immediate medical care; and (e) not to randomly open fire on members of the public, including the plaintiff, in a reckless and/or negligent manner.

[4] The plaintiff further alleged that 'the aforesaid member(s)' breached their duty of care in one or more of the following respects:

(a) randomly firing bullets at members of the public including the plaintiff; (b) endangering her life; (c) disregarding her right to privacy and dignity; (d) abusing their powers; and

(e) acting with deliberate indifference towards her health and safety.

[5] In the further amended plea delivered on 27 August 2018 the defendant denied that the plaintiff sustained the injury in question as a consequence of any conduct by those SAPS members. In the event of

this being proven however, the defendant admitted that the injury was sustained when the members were acting in the course and scope of their employment, but raised three alternative defences. First, that the SAPS members in question acted out of necessity; second, the plaintiff voluntarily assumed the risk; and third, the plaintiff's own negligence contributed to the injury she sustained.

[6] In a nutshell the defendant based these alternative defences on the following pleaded averments. Early that morning at around 3.00am a group of people started gathering illegally in that particular area, and this gathering progressively grew until by 6.00am the crowd had swelled to over 1000 people. Members of the gathering were armed with pangas, knopkieries, sticks and stones; the streets in the vicinity were blockaded with cement blocks, burning tyres and stones; and the flow of traffic in and out of Grabouw was brought to a standstill.

[7] The gathering became increasingly riotous, people on their way to work were intimidated and/or assaulted; and their property as well as SAPS property was damaged. Efforts by SAPS members to restore calm

and disperse the crowd resulted in stones and bottles being hurled at them. These efforts included repeatedly, but unsuccessfully,

requesting the crowd to disperse in English, Afrikaans and isiXhosa. Ultimately the only reasonable means of averting the danger to both the public and SAPS members was to fire rubber bullets into the ground.

- [8] The defendant also pleaded that the plaintiff had knowledge of the risk ‘in entering the gathering’ and therefore consented to the possibility of injury (i.e. the alternative defence of voluntary assumption of risk); or failed to exercise reasonable care (i.e. the further alternative defence of contributory negligence).

#### The evidence

- [9] The parties agreed that the plaintiff bore the onus to prove that the injury she sustained (which resulted in her losing her right eye) was caused by the SAPS members and, if she succeeded, the defendant bore the onus to prove the defences raised.
- [10] The plaintiff testified and called 1 witness, Sergeant Malekotholi Matsemela (“Matsemela”). The defendant called 3 witnesses, Captain Desmond Fortuin (“Fortuin”) stationed at Grabouw SAPS, Captain David Gideon (“Gideon”) stationed at the Boland Public Order Police (“POP”) unit in Paarl, and Warrant Officer Eddie Moos (“Moos”) who is also stationed at Grabouw SAPS. In addition the medical records pertaining to the treatment received by the plaintiff after her injury were admitted into evidence by agreement.
- [11] The plaintiff testified that at the time of the incident she was a first-year student at Boland College, Caledon, studying electrical engineering. She lived in an informal settlement in Grabouw and would catch the college bus from Grabouw to Caledon. On the morning in question she left home with her backpack containing her study books to walk to the bus stop. As she exited her home she saw community members protesting in Old Cape Road. She crossed the road and began walking in the direction of the bus stop along the side of that road when she also saw SAPS members facing the crowd. She had only walked a short distance when she heard gun shots. Immediately thereafter she felt pain in her right eye and blood began streaming down her face.
- [12] She turned and ran back to her home. A relative telephoned Matsimela, who is another of her relatives, on her cell phone to assist in securing safe passage for the plaintiff to the clinic in the area, which was arranged through Matsimela’s commander. From there she was transported by ambulance to hospital in Somerset West, and later Tygerberg Hospital, for further treatment.
- [13] It was also her evidence that at the time of her injury she was not alone on the side of the road; there were children walking to school and other people going to work. Prior to hearing shots being fired she did not notice any teargas, stun grenades or water cannons being used to disperse the crowd.
- [14] During cross-examination she accepted that she is well versed in the English language. She was referred to the notice in terms of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act[5] despatched by her attorney to the defendant on 24 August 2011, i.e. two weeks after the incident, in which it was alleged that as she crossed the road on her way to the bus stop, community members came running in her direction ‘whereby she followed as there were gunshots being fired and people running in all directions... whilst

running to safety, she was shot with a bullet in her right eye'. She denied this had occurred and explained it was possible she had given wrong instructions to her attorney since she had just been released from hospital and was still traumatised.

[15] She was also referred to the affidavit of Dr Robyn Rautenbach ("Rautenbach") dated 13 September 2011 (but deposed to on 27 October 2011)[6] where the doctor recorded that:

'The patient gave the history that she was shot with a rubber bullet on 10 August 2011[7] which impacted her right side of face and right eye. At the time of the incident she reported to be walking to school, when she passed through a group of protesters in the community nearby. The police had fired rubber bullets into the crowd in order to disperse the protesters...'

[16] The plaintiff responded that she told Rautenbach she had crossed the road at the rear of the crowd, and the doctor might have misunderstood her. She denied having told Rautenbach that the SAPS members fired rubber bullets into the crowd to disperse the protesters, attributing this to a possible assumption on the doctor's part. According to the plaintiff at the time of the injury she did not know what was happening at the front of the crowd.

[17] The plaintiff was also referred to her police statement which, although a copy and undated, bears the reference CAS 89/08/2011 and which, to the best of her recollection, was taken about 9 days after the incident. In that statement she relayed that as she reached the other side of the road, she saw people running and heard gunshots: 'I went back, while I was in the road I felt something hitting my right eye... nobody pointed or aimed a firearm at me'. She responded that she had neither read the statement, nor was she asked to do so, before signing, but had told her legal team during pre-trial consultation that she only started running after she was injured.

[18] It was also her evidence that she had not noticed members of the crowd bearing knopkieries, sticks, pangas or stones, nor had she seen any obstacles in the road. She conceded however that this was possible since she could only see the back of the crowd. She had also not heard any appeals for the crowd to disperse. According to the plaintiff she did not see any passerby being attacked by the crowd, or one of them being robbed of his bicycle; nor had the crowd been retreating as she crossed behind the protesters. Although she alleged in the particulars of claim that the incident occurred at approximately 6.15am, she testified that it happened at around 6.45am.

[19] In the plaintiff's view, and despite the concessions referred to above, there was no need for the SAPS members to have discharged their firearms at the time of her injury, since when she was walking down the road, there was 'no chaos'. In response to questions from the Court, the plaintiff's evidence was that when she left her house that morning the area was lit as the streetlights were still on; it was only a matter of between 5 to 7 minutes after leaving her home that she was injured; and that she had already noticed the police facing the crowd as she crossed the road and starting walking towards the bus stop.

- [20] Although the plaintiff could not say with certainty what caused her injury, she again explained that it occurred at the same time as she heard shots being fired. She did not believe that the injury could have been caused by a stone being hurled at her since she had no other injuries apart from that to the right eye itself. The doctor told her that it was probably the result of a bullet. The EMS[8] report reflects that ‘patient sustained gunshot wound’; the triage report of the hospital reflects ‘gunshot, rubber bullet, right eye’; Rautenbach’s note refers to ‘high velocity injury to eye’; and the note from Tygerberg Hospital records ‘blunt trauma to the right eye’. Accordingly, and apart from the reference in Rautenbach’s affidavit that the right side of her face was ‘impacted’, there is no other medical evidence to indicate that she was injured anywhere other than directly in her right eye.
- [21] Matsemela testified that she was employed at Grabouw SAPS from 2010 until 2015 and was then transferred to the POP unit in Faure where she has been working ever since. She explained that these units specialise in crowd/unrest control. At the time of the incident the two closest units to Grabouw were located in Faure and Paarl, each about a 30 minute drive away. She gave fairly detailed evidence about the steps required for purposes of a legal gathering, but I do not deal with it since it is common cause that the gathering in question was an illegal one.
- [22] She also testified about the Police Standing Order (General) 262 (“SO”) which was in operation at the time of the incident. The purpose of the SO is described in paragraph 1.1 thereof as being ‘to regulate crowd management during gatherings and demonstrations in accordance with the democratic principles of the Constitution and acceptable international standards’. Paragraph 14 is relevant for present purposes and reads as follows:
- ‘14. First member(s) at the scene of an unforeseen (spontaneous) gathering
- (1) The first member who arrives at the scene or venue of an unforeseen (spontaneous) gathering must seek to preserve the peace and to protect and help the community.
  - (2) The first member who arrives at the scene or venue must follow the following procedure:
- Step Action 1 Contact the operational centre and request back-up by personnel trained in crowd management. 2 Set up a mobile JOC and notify ACCU who will take operational command on arrival. 3 Attempt to create an atmosphere which is conducive to negotiations by refraining from the display of aggression, such as for instance, the brandishing of firearms and special equipment. 4 Identify the leadership element in order to establish communication and to start negotiations. 5 Set the highest standards of tolerance and, do not use any firearms against the demonstrators except in the case of private defence should lives be in serious danger. 6 Consult with the local authorities and authorized member concerning the gathering and the purpose of the gathering. 7 Bring the contents of section 9(1)(c) of the Act to the attention of the leadership element.

[23] 'JOC' means the joint operational centre that is activated at the scene of an incident or event. 'ACCU' means the Area Crime Combating Unit (now POP). Section 9(1)(c) of the Regulation of Gatherings Act[9] provides that:

'9. Powers of Police.---(1) If a gathering or demonstration is to take place, whether or not in compliance with the provisions of this Act, a member of the Police...

- (c) may, in the case of a responsible officer not receiving a notice in terms of section 3(2) more than 48 hours before the gathering, restrict the gathering to a place, or guide the participants along a route, to ensure---
- (i) that vehicular or pedestrian traffic, especially during traffic rush hours, is least impeded; or
- (ii) an appropriate distance between participants in the gathering and rival gatherings; or
- (iii) access to property and work-places; or
- (iv) the prevention of injury to persons or damage to property;'

[24] Also of relevance is paragraph 11 of the SO:

#### '11. Execution

- (1) The use of force must be avoided at all costs and members deployed for the operation must display the highest degree of tolerance. The use of force and dispersal of crowds must comply with the requirements of section 9(1) and (2) of the Act. During any operation ongoing negotiations must take place between officers and conveners or other leadership elements.
- (2) If negotiations fail and life or property is in danger, the following procedure must be followed:

Step Action 1 Put defensive measures in place as a priority. 2 Warn participants according to the Act, of the action that will be taken against them, should defensive measures fail. 3 Bring forward the reserve or reaction section or platoon, that will be responsible for offensive measures, as a deterrent to further violence, should the above-mentioned measures not achieve the desired result. 4 Give a second warning before the commencement of the offensive measures, giving innocent bystanders the opportunity to leave the area. 5 Plan all offensive actions well and execute them under strict command after approval by the CJOC.

- (3) If the use of force is unavoidable, it must meet the following requirements:
  - (a) the purpose of offensive actions are to de-escalate conflict with the minimum force to accomplish the goal and therefore the success of the actions will be measured by the results of the operation in terms of cost, damage to property, injuries to people and loss of life;
  - (b) the degree of force must be proportional to the seriousness of the situation and the threat posed in terms of situational appropriateness;

- (c) it must be reasonable in the circumstances;
- (d) the minimum force must be used to accomplish the goal; and
- (e) the use of force must be discontinued once the objective has been achieved.
- (4) The following are prohibited or restricted during crowd management operations:
  - (a) the use of 37 mm stoppers[10] (prohibited);
  - (b) the use of firearms and sharp ammunitions including birdshot and buckshot (prohibited); and
  - (c) the use of rubber bullets (shotgun batons) (may only be used to disperse a crowd in extreme circumstances, if less forceful methods prove to be ineffective – restricted).
- (5) Force may only be used on the command or instruction of the CJOC or operational commander (if appointed). Members may never act individually without receiving a command from their commander.
- (6) All members involved in the actions must form part of a unified command structure, consisting of sections, platoons or companies. Members not working in sections may not be deployed. All visible policing members deployed for such purposes must be trained in the management of crowds.
- (7) Common law principles of self defence or private defence are not affected by this Order.'

[25] 'CJOC' means the commander of the joint operational centre. The remaining provisions of s 9(1) appear to be directed at legal gatherings. The relevant provisions of s 9(2) essentially empower a police officer with the rank of Warrant Officer or higher, if he or she has reasonable grounds to believe that danger to persons and property cannot be averted, then and only then to take the following steps: (a) calling upon the persons to disperse, and failing which: (b) order the use of force, excluding the use of weapons likely to cause serious bodily injury or death. The degree of force which may be used shall not be greater than is necessary for

dispersing the persons gathered and shall be proportionate to the circumstances of the situation and the object to be attained. However if any participant causes death or serious injury to person or property, or attempts or manifests an intention to do so, the police officer concerned may order SAPS members under his or her command to take the necessary steps including that, if such officer finds other methods to be ineffective or inappropriate, to order the use of force, including the use of firearms and other weapons, but only to the extent necessary. It was Matsemela's evidence that 'defensive measures' include water cannons as well as certain uniforms and vehicles to induce fear, but that water cannons also qualify as an 'offensive measure', as do stun grenades.

- [26] It was also Matsemela's evidence that on the day of the incident her shift started at 6am and she arrived at the protest around 6.30am (she later testified that she arrived there about 6.15am). At the time she was still working out her probationary period, and took up her position on the instructions of her supervisor, Sergeant Nombewu. She identified her position with reference to a photograph, indicating that she stood on the verge opposite the corner of Old Cape and Industrial Roads, some metres behind where SAPS members were facing the crowd and close to where their police vehicles were parked.
- [27] At that stage she did not notice any damage being caused to property, but could not exclude the possibility that this might already have occurred. She explained that she would not have observed teargas being used to disperse the crowd before rubber bullets were fired, since only POP units are permitted to use teargas. Unlike her earlier evidence, according to her the use of teargas, stun grenades and water cannons – which only POP units are authorised to employ – are all less forceful means than resorting to firing rubber bullets.
- [28] She also testified that a local community leader by name of Mr John Michaels was known to her as well as to Fortuin as someone who could, and did, rally community members to protest in their numbers. In her words 'it always happened and there was always an element of danger, and Captain Fortuin knew him very well'.
- [29] After taking up her position she noticed a large crowd of protesters as well as stones and rocks in the road. She estimated the crowd to be about 500 in total, but conceded that there could have been 1 000 protesters, who were filling the road. Upon her arrival the crowd was 'standing and singing' and then about 10 minutes later she saw some armed with what she described as sticks. There were only about 10 SAPS members facing the crowd, and most were armed with shotguns from which rubber bullets can be fired. It was then that she saw what she described as the 'shootout'.
- [30] Matsemela's evidence was further that during the face-off between the SAPS members and the crowd she observed children going to school and people walking to work. According to her, while the protesters allowed children and women with infants to pass, they blocked people who were trying to get to their places of employment.
- [31] Once the police discharged the rubber bullets, the crowd retreated a few steps back but then started throwing stones at the police. It was at that point that Matsemela received the telephone call that the plaintiff was injured and was requested to speak to the officer in charge to arrange safe passage for her to the clinic. She accompanied the plaintiff to the clinic and it was only between 9.00 and 10.00am that she saw members of the POP unit on the scene. At that time there was still a large crowd of protesters in the road. According to Matsemela, a rubber bullet can cause serious injury.
- [32] In cross-examination Matsemela's evidence was that during the period between the plaintiff's injury and the arrival of the POP unit – which she estimated to be about 3 hours – the SAPS members were compelled to fire rubber bullets again since the crowd repeatedly advanced on them. She conceded that after initially arriving on the scene she saw protesters

had spilled over onto the sides of the road, including where the plaintiff and others had allegedly been walking. She also agreed that, based on her experience as a SAPS member, police officers may make use of rubber

bullets to protect themselves when being attacked by a crowd of stone throwers, and where they do not have access to “less forceful means” such as teargas, stun grenades and water cannons.

[33] Although Matsemela maintained that the crowd was not aggressive when she arrived on the scene, in the same breath she conceded that

(a) the protesters were actively preventing people from going to work; (b) they were armed with knopkieries, sticks and other weapons; and (c) she could not exclude the possibility that they had already thrown stones at the SAPS members prior to her arrival. She also maintained that Fortuin only appealed to the crowd to disperse after the shots were fired, and that she could not recall any earlier warning.

[34] She was referred to her statement made, as she recalled, within two days after the incident, in which she relayed that ‘we were busy dispersing the community that were protesting and throwing the police vans with stones. Rubber bullets were fired to disperse...’. She confirmed this version to be correct, save for the damage to the police vehicles, attributing it to a mistake since ‘the police had already alighted from the vehicles when the stones were thrown’. When asked to explain the discrepancy between her statement and earlier testimony she conceded that stones were first hurled at the SAPS members; then rubber bullets were fired, resulting in chaos; and thereafter the protesters increased their assault on the SAPS members by ‘continually’ throwing stones at them.

[35] She could not dispute the version of the SAPS members that the protesters intimidated people going to work and were warned to disperse and/or desist, and that only after the crowd proceeded to throw stones were rubber bullets fired. She accepted that, given the circumstances, the SAPS members had no other means available to try to control the situation (i.e. by firing rubber bullets) until the POP unit finally arrived and took over. In her words ‘...they had no other means and could not have left the scene because there would have been greater damage’.

[36] In the same statement Matsemela relayed that she asked the plaintiff what happened when she visited her later that day in hospital:

‘She told me that she was crossing the road when she saw a crowd of people dispersing all over the road, she also tried to run away, but she heard a shot into her right eye and started bleeding and managed to get to the shacks where she was assisted by other community people who were also running away. She mentioned that she didn’t see the police were shooting but she was informed by community that she has been shot by the police who were shooting them with rubber bullets.’

- [37] Fortuin testified that he has 31 years' service and at the time of the incident was the Head of Vispol[11] at SAPS Grabouw. He was previously stationed at POP from 1991 until 2000 where he received specialised training in crowd control. He was familiar with the contents of the SO. On the morning of the incident he was contacted at about 3.15am by Captain Josephs who was working night shift. Josephs informed him that Michaels, the Chairperson of the Grabouw Civic Association, had called the station to say that he would that day make Grabouw 'unbearable, bring the economy to a standstill, and burn [Grabouw] down'.
- [38] After mobilising members of his Crime Prevention Unit, Fortuin went to the police station. He and these members arrived at around 3.45am. Fortuin briefed them, knowing that given Michaels' support base, a large number of protesters would be gathering. The weapons available to Fortuin and his team were 9mm pistols and shotguns capable of firing rubber bullets. They armed themselves with the latter 'because this is how we were trained'. His evidence was further that by then Josephs had already notified the POP unit in Paarl, but was told that it 'did not have a night shift' and would only be available to assist once the day shift came on duty at 7am. Contact was made with the Paarl unit since Grabouw falls under its jurisdiction (as opposed to Faure).
- [39] At about 4am the team proceeded to the scene in their vehicles and parked them sideways across the road to block it. By then chaos had already erupted. The road was blockaded with fires and concrete blocks, and a crowd of about 500 people were singing, dancing and many were brandishing knopkieries. Fortuin recognised Michaels at the front of the crowd and called him over to the police vehicles. He told Michaels the gathering was illegal and the protesters must disperse. Michaels was very aggressive and retorted that the police could not tell him what to do.
- [40] Using a microphone, Fortuin proceeded to warn the protesters in both English and Afrikaans, whereafter Nombewu warned them in isiXhosa. The warning was ignored. It was repeated an hour or so later at around 5am and again ignored. At 5.30am the SAPS members formed a line facing the crowd. As Fortuin recalled there were only 12 of them. It was thereafter that people starting walking along the sides of the road on their way to work. Some of the protesters grabbed one of the passersby and assaulted him by kicking and punching him. Another passerby approached on his bicycle and was thrown off, assaulted in a similar fashion, and his bicycle shoved into one of the fires.
- [41] It was then that Fortuin ordered his members to advance towards the crowd. In response they began pelting the officers with bottles and stones: 'There were a lot, we had to duck and dive from the stones and bottles which were thrown with force. I was scared but also had to protect not only the community but also the members under attack'.

[42] Fortuin then gave the order for his members to fire rubber bullets into the ground so that they would ricochet: 'That's how we were trained – not to shoot at the crowd but to the ground'. At this point he and his members were positioned in a line facing the crowd about 5 metres away near the corner of Old Cape and Industrial Roads (this is where the plaintiff had alleged in her particulars of claim she was walking when injured). According to

Fortuin, if a ricocheted bullet strikes a person, it should only cause bruising, and this is why it was termed a 'soft approach'. It was also his evidence that he was compelled to issue this order 'to protect life and property because criminal elements in the crowd were assaulting people and destroying property'. In addition the protesters had grown in number and became increasingly angry since 'they wanted to go to the town and burn it down'.

[43] The firing of rubber bullets into the ground resulted in the SAPS members managing to move the crowd back about 50 to 60 metres, although they continued to throw stones while running away. With reference to a photograph Fortuin demonstrated the distance between where the police vehicles were parked across the road behind the SAPS members to the entrance of the informal settlement where the plaintiff lived to be about 50 to 60 metres. His evidence was that the protesters retreated to that point. Fortuin and his members moved back to their vehicles and, after reloading their shotguns with rubber bullets, moved their vehicles away since the stone throwing had continued unabated and the crowd was again advancing.

[44] Fortuin then gave the order for a further round to be fired into the ground. This sequence of events was repeated about 5 times over the approximately 2 hour period that followed when the POP unit finally arrived, as Fortuin recalled, some time between 8 and 9am. It was also his evidence that he arrested Michaels on the first occasion the SAPS members returned to their vehicles to reload. He was referred to his statement in which he had detailed the identities of the members armed with shotguns, totalling 10 in all, including Moos, but excluding himself and Nombewu (presumably because they were the senior officers). The statement also records that a total of 460 rubber rounds were fired during the entire period on the scene.

[45] When asked why he had not used other methods to disperse the crowd, Fortuin replied that the only weapons available to them were 9mm pistols (with live ammunition) and shotguns with rubber bullets. They had not been issued with any alternative deterrent methods such as teargas. The use of 9mm pistols was out of the question because this could have caused serious injury or death. There were only 12 members to manage a crowd of aggressive, armed protesters which swelled from about 500 on arrival at the scene to 1 000 about 2 hours later. He and his members had managed to contain the crowd for that period, but when they attacked people and property he had no option but to order them to discharge rubber bullets into the ground. In his words: 'It was really necessary to act as we did because all our lives were in danger as were the community and property'.

- [46] Given that Fortuin's testimony elicited in chief about Josephs having contacted the POP unit in Paarl was hearsay, it was surprising that counsel for the plaintiff did not object at the time. However the reason for this became apparent as the trial proceeded, as I will demonstrate below.
- [47] During cross-examination Fortuin accepted he could not dispute the plaintiff's version (in court) that she was walking along the side of the road when she was injured since, like Matsemela, he explained that the crowd had spilled over onto the sides of the road. The same applied to children on their way to school and others going to work.
- [48] He was subjected to fairly lengthy questioning about the call made by Josephs to the POP unit. In one of his statements Fortuin had declared that the events of that day commenced at 2am and ended at 1pm. Apparently working on the assumption that Josephs was notified by Michaels at 2am, Fortuin was criticised for not mobilising his members earlier, despite his uncontested evidence that Josephs only contacted him at around 3.15am. The general tenor of this line of questioning was directed at the failure of the POP unit to arrive earlier on the scene, and it was suggested that the Court would be asked to draw an adverse inference from the defendant's failure to have put this to the plaintiff and Matsemela. Counsel for the defendant pointed out that it was not necessary for him to have done so, given that the failure to summon the POP unit earlier (or its failure to arrive earlier) was never part of the plaintiff's pleaded case. Counsel for the plaintiff then indicated he would seek an appropriate amendment to her particulars of claim. I deal again with this below.
- [49] During further cross-examination Fortuin agreed that, even with a crowd of 500 people, the SAPS members on the scene were hopelessly outnumbered and this made it extremely difficult for them to maintain law and order. He pointed out however that the SAPS members had nonetheless managed to do so for a 2 hour period after their arrival on the scene, during which he 'repeatedly' warned the protesters to disperse and called for calm, despite the growing crowd, but was ignored. He later added that he had also tried to continue negotiating with Michaels to no avail.
- [50] He further agreed that the situation which eventuated could have been avoided had the POP unit arrived earlier; and, as was put to him, given the ultimate size of the crowd, its aggression and hurling of bottles and stones, 'that 10 members can never conceivably control such a crowd'.
- [51] Fortuin conceded that SAPS members from another 4 stations within a radius of about 50km could have been called upon to assist, but responded that they had a severe shortage of manpower in those stations with only 2 to 3 members per shift. On his uncontested evidence this would therefore have amounted to a maximum of a further 12 members who would then have had to leave their own stations entirely unmanned. In my view, the concession then extracted from him that this would have allowed the plaintiff to move along to the bus stop unharmed can best be described as unrealistic, both in light of his testimony as a whole as well as the propositions put to him by the plaintiff's counsel himself. (In later re-

examination

Fortuin was asked whether he had authority to compel officers from other stations to assist, and replied that he did not).

- [52] Fortuin was referred to one of his statements in which he relayed that he gave the order for his members 'na die skare te vuur'. He replied that what he meant was to shoot 'down towards them on the ground'. His evidence was further that the travel time between Paarl and Grabouw is about 45 minutes to an hour. He conceded that the POP unit in Faure could have been contacted but continued that Faure 'is closer but this is for the Metropole and we fall under Boland'.
- [53] When I raised with plaintiff's counsel the relevance of this line of questioning, given her version that the crowd was calm and unarmed at the time of her injury, he responded he was testing the defendant's pleaded case in order to establish whether the SAPS members concerned had utilised all available resources responsibly. Reliance was placed on paragraph 6 of the particulars of claim read with paragraph 7 of the defendant's further amended plea.
- [54] These refer to the common cause legal duty resting upon the SAPS members concerned to employ all available resources responsibly, efficiently and cost-effectively to maximise their use (as set out at paragraph 3.2 of this judgment). It was submitted that this had been pleaded by the plaintiff in sufficiently wide terms to leave it open to the Court to make a finding on the issue. Counsel for the defendant disagreed, pointing out that what had been pleaded was law and not fact. I also deal with this below.
- [55] When asked whether he could exclude the possibility that the plaintiff was injured by a ricocheted rubber bullet, Fortuin replied that he is not a ballistics expert but only trained in crowd control. He added however that before 2011 SAPS were issued with 'blue rubber bullets' but since then only 'white' ones because they are 'not so hard but very light'. When asked if one of these could cause a serious injury, he responded that to the best of his knowledge it was possible only if shot directly and at close range, not if it ricocheted.
- [56] He also explained that there are 5 such bullets in each single round. On my calculation this would mean that, given that 460 rounds in total were fired by 10 members, it must have occurred closer to 9 times and not about 6 times as he earlier testified. Although he conceded he could not say with certainty that none of the members had fired at the crowd, he was clear that this had not been his instruction to them.
- [57] He also testified that after his arrival on the scene he remained in radio contact with Josephs who continued to call the POP unit from Paarl for assistance on his instruction. The consistent response was that there was no one on night shift duty. When put to him that 'the SAPS members' were under a duty to put appropriate measures in place he replied 'yes, that's exactly what we did'. In response to the plaintiff's version (in court) Fortuin maintained he already gave the order to fire rubber bullets after the two passersby were

assaulted between around 5.30 to 6am, so by the time the plaintiff allegedly crossed the road at about 6.45am, at least one round of shots had already been fired. He was adamant that she must have been aware of the chaos on the scene.

- [58] Although Moos testified after Gideon, it is convenient to deal with his evidence first since he was also one of the SAPS members under Fortuin's command at the scene. Moos testified that he was contacted by Josephs at about 3.15am and reported for duty at 4.30am whereafter he joined the rest of the members on the corner of Old Cape and Industrial Roads. There he found a crowd of about 500 people engaged in an illegal protest. They were aggressive and 'under the guidance' of Michaels were threatening and swearing at the SAPS members. Some carried knokkieries and sticks and the protesters had blocked the road with cement blocks, tree stumps and rubble.
- [59] He witnessed Fortuin informing Michaels that his actions were illegal and that the crowd should disperse. Fortuin gave 3 warnings, one at 4.30am, the next around 5am and the third and final one at about 5.30 to 5.40am. It was before Fortuin gave the third warning that some of the protesters started assaulting passersby on their way to work. Moos witnessed the incident with the bicycle about which Fortuin had testified: 'that was when Captain Fortuin gave the third instruction for us to get ready – we fell in line facing the crowd next to each other'. He later explained that this was when Fortuin gave the order for rubber bullets to be fired 'in front of the crowd'.
- [60] It was in response to this that Michaels started swearing at Fortuin who, with the assistance of Moos, arrested Michaels and put him in the back of a police vehicle. The crowd then began to throw stones and empty bottles at the SAPS members. The intensity of this assault was such that the police vehicles had to be moved to avoid them being damaged.
- [61] His evidence was further that after rubber bullets were first discharged the line of officers advanced towards the crowd in an effort to get the protesters to retreat towards the informal settlement behind. The crowd would retreat, gather more stones, and then advance again, hurling them at the SAPS members. They in turn would re-advance, firing, it would seem, further rounds. Moos recalled that this continued for about 30 minutes, and he feared for his life as well as those of the community and further damage to property. His evidence was that he had not fired any bullets directly at anyone. He left the scene when the POP unit finally arrived, which he recalled to be about 7.30am.
- [62] During cross-examination Moos confirmed that he was 'firing in the direction of the people'. This was not further explored, but a concession was extracted from him that, by doing so, he could have foreseen the possibility of an innocent person being injured. He responded 'but I didn't see any innocent people'. He agreed that by the time the crowd became uncontrollable it was apparent that the SAPS members were hopelessly outnumbered. He also agreed that when the plaintiff entered the area it was possible there was still 'sporadic stone throwing and shooting'. He disagreed however that by the time passersby were present it was unnecessary for SAPS members to discharge their weapons, purely for that reason

(this was not put to Fortuin when he testified either).

- [63] In response to questions from the Court it was Moos' evidence that residents of the informal settlement in the immediate vicinity must have heard the commotion and firing of rubber bullets, and it would therefore not have been possible for the plaintiff to be unaware of this when she later left her home to walk to the bus stop.
- [64] Gideon testified that he has been stationed at the POP unit in Paarl since 1993. He was requested by the defendant's counsel to check that unit's records in order to ascertain whether any members were on night shift on 9/10 August 2011. According to these records there was no shift that night, and the day shift only commenced duty at 6am on the day of the incident. He confirmed, as Fortuin testified, that Grabouw SAPS falls under the Boland jurisdiction. According to the same records the day shift was alerted about the incident at around 6am and arrived in Grabouw at about 7.30am.
- [65] During cross-examination Gideon explained the manpower constraints on the unit at the time, resulting in there being only two shifts per 24 hours, the first from 6am to 2pm and the second from 2pm to 10pm or midnight, depending on prevailing circumstances. Thereafter only two to three members remained stationed in the operations room until the next shift started.
- [66] His evidence was further that if the operations room was notified of the need for emergency assistance the person receiving the call would have been required to inform the Commander at the time, a Captain Gray, who has since passed away. While it was possible for off duty POP members to be summoned in an emergency 'it will take some time... 2 to 2 ½ hours... because members live all over the place'. As he recalled, at the time of the incident the unit was equipped with teargas, rubber bullets and stun grenades but no water cannons. However he later conceded that it must have been equipped with a water cannon as well since this is evident from one of the photographs taken of the scene. When asked if teargas and stun grenades would have been effective in subduing a crowd, Gideon replied that it would depend on its size and the number of POP members in attendance – the larger the crowd, the more difficult.
- [67] He speculated that if the POP members had been summoned when contact was made with the operations room 'probably 18 or less' members would have been able to be summoned. Had this occurred, and had they been equipped with a water cannon, then they would have been able to disperse a crowd of 500 protesters.

## Discussion

- [68] I will assume in the plaintiff's favour that, given the medical evidence, she was in all probability struck by a ricocheted rubber bullet. I am fortified in this view by her pleaded case that she was injured near the corner of Old Cape and Industrial Roads, which is where the SAPS members were positioned when they fired rubber bullets into the ground, as well as the testimony of Matsemela and Fortuin that the crowd had by then spilled over onto the sides of the road.
- [69] I will also assume in her favour that the version she gave in court about where she was when injured was correct since it fits into the objective facts (despite the differing versions she previously gave as recorded in the various statements referred to earlier in this judgment). I make these favourable assumptions, as opposed to specific credibility findings, since as will appear from what follows they ultimately do not assist her case.
- [70] It is inconceivable that the plaintiff would not have heard shots being fired before leaving her home around 6.45am. On the established facts and inherent probabilities the crowd was far from docile as she claimed when she entered the area. While I accept that she would not willingly have proceeded to walk directly into the heart of the protest, on the probabilities she passed at least alongside the protesters at a time when their assault on the SAPS members was well underway.
- [71] It was submitted on behalf of the plaintiff that, given the defendant's election to call Gideon to testify, his counsel clearly foreshadowed that he was required to 'close the gap' subsequent to the debate about the plaintiff's pleaded case during Fortuin's testimony.
- [72] As I see it, the difficulty with this submission is that it overlooks the specific grounds upon which the plaintiff pleaded that the 'said SAPS members' – i.e. those stationed at Grabouw who were on the scene at the time the plaintiff was injured, and not the POP unit – breached their duty of care towards her as set out in paragraph 2 of this judgment. Ultimately, and given the evidence of Fortuin and Moos, the plaintiff was constrained to pin her case on the alleged failure by those SAPS members to avoid 'the shooting incident' when by the exercise of reasonable care they could and should have done so.
- [73] This in turn led to the plaintiff relying on what appears to have been a dereliction of duty on the part of the POP unit, but without seeking to amend her particulars of claim to that effect, despite this being pertinently raised by the Court during Fortuin's testimony. I agree with counsel for the defendant that the pleading of law (i.e. the SAPS Act and Code of Conduct) provided no factual basis for the defendant to be alerted to the case he would later be required to meet.
- [74] Had the plaintiff pleaded reliance on POP's apparent dereliction of duty from the outset the defendant may well have approached his defence in a different manner; and even if the late amendment was introduced and allowed, the defendant would have been afforded a proper opportunity to deal with it even if this caused a postponement.

[75] Summons was issued on 28 July 2014, just under 8 years before the trial commenced, yet the plaintiff did not even request trial particulars or seek admissions from the defendant. It is thus fair to accept that she intended all along to place the blame only on the Grabouw SAPS members who were on the scene on the morning of the incident. The fact that the defendant later adduced Gideon's testimony does not alter the case he was required to meet, and in any event Gideon's evidence merely supported the main pleaded defence of necessity.

[76] Counsel for the plaintiff placed reliance on *Sentrachem Bpk v Wenhold*[12] where the Court in turn referred to *Shill v Milner*[13] in which it was stated that:

'The importance of pleadings should not be unduly magnified. The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has wide discretion. For pleadings are made for the Court, not the Court for pleadings. Where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been.'

[77] To my mind however, and for the reasons already given, to "read into" the plaintiff's particulars of claim the case which, seemingly by dint of fate, evolved during Fortuin's evidence, would not only cause prejudice to the defendant but would also prevent a full inquiry. This too is evident from the sparse testimony of Gideon himself. Put differently, as a result of the plaintiff's own choice, this Court does not have before it 'all the materials on which it is able to form an opinion, and this being the position it would be idle for it not to determine the real issue which emerged during the course of trial'. [14] I am also unable to agree with the submission made by plaintiff's counsel that the following reference in his opening address was sufficient notice to the defendant of the case he had to meet:

'On the defendant's own admission, between the hours of 02h00 and 03h00, the group of protesters were growing larger, and the SAPS should have deployed specialised members/units to maintain law and order, which they failed to do.'

[78] What is contained in an opening address, if not borne out by the pleaded case, cannot be elevated to anything more than that. But in any event, this submission was not supported by the subsequent evidence. It was rather an assumption based on how the plaintiff viewed the defendant's case.

[79] In *Minister of Safety and Security v Slabbert*[15] the Supreme Court of Appeal explained it thus:

[10] The question that arises for consideration is whether the case pleaded by the plaintiff covers the assertion that the refusal to release him into his wife's care rendered the further detention unlawful. A perusal of the particulars of claim shows clearly that such a case was not pleaded. As stated, the arrest and detention were challenged on the basis that the police had no legal justification for effecting them. As expected, the defendant's plea addressed only that issue.

[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.

[12] There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*, this court said:

*"However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence."*

This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue."

[13] The issue on which the court below relied as a basis for liability was not fully canvassed at the trial presumably because it was not pleaded and the parties' attention was not drawn to it. It was fleetingly touched upon during Magoxo's cross-examination. The response elicited was that the plaintiff was still drunk at the time his wife made the request. The issue was not pursued and furthermore the plaintiff's wife did not testify to support the contention.'

[80] In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*[16] the same court held:

[10] But our law also recognises that there are circumstances in which even positive conduct that causes bodily harm will not attract liability. That is so where the harm is caused in circumstances of necessity, which have been described as occurring when the conduct is 'directed against an innocent person for the purpose of protecting an interest of the actor or a third party (including the innocent person) against a dangerous situation.' It is well established that whether particular conduct falls within that category is to be determined objectively. That the actor believed that he was justified in acting as he did is not sufficient. The question in each case is whether the conduct that caused the harm was a reasonable response to the situation that presented itself'

[81] Moreover in *Petersen v Minister of Safety and Security*[17] it was stated:

[11] Can it be said that in these circumstances the police action which caused Justin's injuries does not attract liability because it was justified in circumstances of necessity? Unlike self-defence – also referred to as private defence – the defence of necessity does not require that the defendant's action must be directed at a wrongful attacker. There was therefore no need for the

respondent to establish that Justin was himself part of the attacking crowd. What the respondent had to prove in order to establish the justification defence of necessity, appears, for example, in broad outline, from the following statements in “Delict” volume 8(1) Lawsa (2ed) by JR Midgley and JC van der Walt, paragraph 87:

'An act of necessity can be described as lawful conduct directed against an innocent person for the purpose of protecting an interest of the actor or a third party . . . against a dangerous situation . . .

Whether a situation of necessity existed is a factual question which must be determined objectively. . .

A person may inflict harm in a situation of necessity only if the danger existed, or was imminent, and he or she has no other reasonable means of averting the danger. . .

The means used and measures taken to avert the danger of harm must not have been excessive, having regard to all the circumstances of the case . . . ’

[82] The evidence of Fortuin and Moos, supported by that of Gideon, speaks for itself and objectively demonstrates that the SAPS members concerned acted out of necessity when discharging their firearms containing rubber bullets. As plaintiff’s counsel himself put it to both Fortuin and Moos, they were hopelessly outnumbered. Their undisputed evidence (supported by Matsemela herself) was that they had no access to alternative methods to disperse the crowd such as teargas, stun grenades and water cannons. Both testified that no shots were fired directly at or into the crowd. Moreover Matsemela did not see them shooting randomly at the crowd and nor did the plaintiff. There was no evidence that anyone other than the plaintiff was injured by a bullet being fired, nor of the distance a fired rubber bullet can ricochet.

[83] While I accept there were certain contradictions between the testimony of Fortuin and Moos as to the exact timeline and sequence of events, I do not consider them to be material. Both officers testified almost 11 years after the incident and, if anything, the discrepancies in their versions rather show their honesty and that they made no attempt to tailor them to match or to suit the defendant’s case.

[84] While I have sympathy for the plaintiff’s plight – an innocent young woman trying to reach the bus stop to further her hard fought for education – I cannot overlook the fact that she also voluntarily assumed the risk of injury, whether at the hands of one or more of the protesters or the SAPS members acting out of necessity. For all these reasons I am compelled to conclude that the plaintiff’s claim must fail.

[85] The following order is made:

‘The plaintiff’s claim is dismissed with costs.’

J I CLOETE

For plaintiff: Adv M Salie SC with Adv R Liddell

Instructed by: Adendorff Attorneys (L R Snyman)

For defendant: Adv S O'Brien

Instructed by: The Office of the State Attorney (Mr L Ngwenya)

[1] South African Police Service

[2] No 68 of 1995

[3] Effective as from 2 December 2010; Annexure 'POC2' to the particulars of claim.

[4] And that their duties in terms of the SAPS Act and Code of Conduct extend to the general public.

[5] No 40 of 2002.

[6] This was one of the medical records handed in by agreement.

[7] Although the affidavit refers to 9 August 2011, the parties agreed this was a patent error.

[8] Metro Emergency Medical Services.

[9] No 205 of 1993.

[10] Teargas canisters of a certain size.

[11] SAPS Visible Police.

[12]

[1995] 2 All SA 524 (A).

[13] 1937 AD 101 at 105.

[14] Collen v Rietfontein Engineering Works 1948

(1) SA 413 (A) at 433.

[15]

[2010] 2 All SA 474 (SCA).

[16] 2007 (2) SA 118 (SCA).

[17]

[2010] 1 All SA 19 (SCA).

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