

SOUTH AFRICA / JUDGMENT

Lehlela v Minister of Police (A37/2023)

[2024] ZAWCHC 107 (19 April 2024)

[2024] ZAWCHC 107**COURT**

Western Cape High Court, Cape Town

BEFORE

Henney, Dolamo, Salie

CASE / FILE NUMBER

A37/2023

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Source record**FLYNOTES:**

PERSONAL INJURY – Police shooting – Liability –
Shot
in eye by rubber bullet causing blindness – SAPS attempting
to crowd control protestors – Pleadings couched
to
incorporate respondent's statutory duty of care – Including
public order policing – Respondent created situation
by
failing to have POP unit available – Would have taken
control of situation – Appellant on probabilities would
not
have been shot – Defence of necessity and voluntary
assumption of risk not applicable – Appeal upheld.

IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
Case
No.: A37/2023
In

the matter between:

DIBAKISO
ALETTA
LEHLEHLA Appellant
and
THE
MINISTER
OF
POLICE Respondent

Coram: Henney, J et Dolamo, J et Salie, J
Date
of Hearing: 22
January
2024
Judgment
delivered: 19
April 2024
Counsel
for Appellant: Adv. M
Salie SC
Adv.RM
Liddell
Instructed
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Counsel
for Respondent: Adv. Stan O'Brien
Instructed
by: The
State Attorney

JUDGMENT

DELIVERED ON 19 APRIL 2024

SALIE, J (Dolamo, J concurring)

HENNEY, J (dissenting)

SALIE, J:

1] This is an appeal before the full bench of this division, with leave of the Court a quo, against its Order in which the appellant's delictual claim against the respondent was dismissed with costs. As the merits and quantum were separated by agreement at the commencement of the trial, the court a quo determined the merits only.

2] The events forming the basis of this action, are that on 10 August 2011, the appellant was struck in the right eye by a rubber bullet fired by a South African Police Service ("SAPS") official, resulting in her being blind in that eye. She was 19 years of age at the time and an electrical engineering student at the Boland College in Caledon.

3] The appellant's case is that on the date in question, she was on her way to college to write an examination when at approximately 06h45 she encountered protesters in the vicinity of Ou Kaapse Weg, Grabouw. Members of the SAPS were present on the scene. She intended to board a bus en route to the college. Whilst walking on the gravel path passing the protesters, she heard the sound of gunshots. She felt blood streaming down her face and immediately turned around and ran back to her home, a 5 to 7 minutes (walk) away. Her family attended to her wounds at

home and then called her cousin, Ms. Malerotholi Matsemela ("Matsemela") a police officer at the scene, who requested the senior officers to allow the appellant to proceed to the local day hospital. The appellant was transported by ambulance from the day hospital to the public hospital and thereafter transferred to Tygerberg Hospital.

4] In her particulars of claim the appellant alleged that the members of the SAPS were under a legal duty to take care not to injure or harm innocent persons and ought to have acted with extreme caution. The use of force was to be the last resort and that the members of the SAPS had failed in their duty of care in a number of ways. Consequently, she was "wrongfully, unlawfully, alternatively maliciously, alternatively further negligently and without just or probable cause" shot in the right eye by members of SAPS acting in the course and scope of their employment with the respondent and who had failed in the carrying out of their functions in the following ways:

- (i) failed to handle their firearm(s) with proper consideration for safety of members of the public;
- (ii) failed to properly handle their firearm(s) loaded with ammunition (rubber bullets); and
- (iii) failed to avoid the shooting of the appellant when by the exercise of reasonable care the members could and should have done so.

5] Under the heading "South African Police Service Code of Conduct", the pleadings state further that the:

"...members were obliged by virtue of the SAPS Code of Conduct to create a safe and secure environment for the appellant, to prevent action(s) which may threaten the safety or security of the appellant, to uphold the Constitution and the law, to render a responsible and effective service of high quality, to utilize all the available resources responsibly, efficiently and cost-effectively to maximise their use, to uphold and protect the fundamental rights of the plaintiff, to act transparently and in an accountable manner, and to exercise the powers conferred upon them in a responsible and controlled manner." (Emphasis my own)

6] The respondent, in a further amended plea, denied that the appellant sustained the injury in question as a consequence of any conduct by those SAPS members. However, in the event it being proven, the respondent admitted that the injury was sustained 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, that the appellant voluntarily assumed the risk; and third, the appellant's own negligence contributed to the injury she sustained.

7] At the commencement of the trial, counsel for the appellant set out in its opening address that her case is that members of SAPS were under a legal duty to take care not to injure or harm innocent persons and ought to have acted with extreme caution, and to use force only as a last resort. Members of the SAPS failed to implement reasonable measures, including the deployment of specialised units to disperse a threatening crowd timeously, adequately or at all.

8] Through the testimony of Matsemela, the issue regarding the full scope of available police resources in relation to the protest were elucidated. Matsemela the cousin of the appellant, is employed in the SAPS and was deployed at the protest action on the day in question. She arrived at the scene around 06h15, shortly after her shift started at 06h00. She was stationed at SAPS Grabouw at the time. Matsemela has since 2015 been deployed with the Public Order Police ("POP"). Captain Fourie was in charge of the police officers at the scene. The witness testified that in terms of standing order 262 titled "Crowd management during gatherings and demonstrations" a threat assessment is made after obtaining information in relation thereto. The level of threat is divided into 3 categories of risk, with level 3 being the greatest risk level. In a level 3 risk category the controlling and combatting is not to be done by the visible police or the local police, however, must be attended to by the POP previously named the Area Crime Combatting Unit (ACCU). The POP is a specialised police unit of the SAPS, trained and armed with different weapons to contain and control a level 3 risk.

9] Matsemela testified that Mr. John Michaels ("Michaels") is known as a community leader and highly effective in creating uprising protests in the community with an element of danger. The crowd had within a matter of minutes increased from approximately 500 to 1000 persons by 06h30. People were passing through by walking on the gravel side of the road towards the nearby situated clinic as well as children going to school and those going to work. Whilst the crowd allowed the children to pass through they blocked the persons on their way to work. Members of the crowd were armed with sticks and the group were riotous. A platoon of 10 police officers were attempting to control the protesters. The police started firing rubber bullets in order to

disperse the crowd, however, they retaliated by throwing stones at the police officers. It was shortly after this juncture when she received a call that her cousin, the appellant who was passing the protesting crowd, had been injured. Matsemela was requested to engage her colleagues to allow for the appellant to be taken to hospital. She informed her senior at the time, Sergeant Nombewu. He in turn facilitated by allowing the appellant and those persons assisting her to pass through to the clinic where she was initially assisted by the paramedics. The POP arrived a relatively long time after the shooting.

10] Under cross-examination Matsemela confirmed that the relevant standing order relates to a planned gathering which the police had been notified about. In reply, the witness confirmed that in circumstances where there was notice of an imminent threat to public peace, the POP ought to have been called to the scene timeously to contain the crowd. She also testified that a planned protest could be both, a permitted protest which would be legal, or as in this case, an illegal protest. That evidence concluded the appellant's case.

11] Captain Desmond Fortuin ("Fortuin") testified that on the date in question he was the head of the Grabouw Crime Prevention unit and head of the Visible Policing unit ("Vispol"). He testified that standing order 262 on crowd management during gatherings and demonstrations relates to planned and unplanned gatherings. He was contacted around 03h15 on the morning of the incident by Captain Josephs who was working nightshift at Grabouw SAPS. He was informed that Michaels alias John Pyp, the chairman of Grabouw Civic Association, had called him. It was

communicated to him that Michaels was going to Grabouw that day and make it unbearable to the extent that he is going to bring the economy of Grabouw to a standstill by locking down the streets and burning the town down. He attended at the police station and contacted the members of the crime prevention unit commanding them to report at the station. Most of the members arrived around 04h00. He briefed his members as to what had been conveyed to him and advised them that if Michaels plans a riot then there will be a big crowd and chaos as he has great influence over the community members. They went to the protest area, armed with their 9 millimetre service pistols and shotguns with rubber rounds.

12] Counsel for the respondent asked Fortuin why he did not immediately call upon the POP unit to attend at the protest. This evidence was clearly led by the respondent's counsel in response to the opening address by the appellant's counsel and Matsemela's evidence that the POP ought to have been deployed timeously to control the crowd as opposed to the local police. Fortuin replied that he had in fact called upon the POP, however, he was informed that they do not have a nightshift platoon and they will only be available from the next morning at approximately 07h00 to 07h30 after the POP platoon starts the shift. Having no other option, he proceeded with his team as per his earlier evidence. Fortuin testified that at the scene he noted Michaels and that the crowd was rapidly increasing in size. He arrested Michaels as the organiser of the illegal strike on a charge of public violence shortly after the crowd had started throwing stones. He also testified that the riotous conduct of the protesters quickly escalated. A member of the community was robbed of his bicycle which was set alight. Stones, bottles and other items were also thrown at the police members by the protesters.

13] He further testified that he was scared as he and his fellow officers had to "duck and dive". He was acutely aware that the protesters were very powerful and effective when they conduct these riots and that he had to act to protect and serve the community of Grabouw as well as the members who were under attack. He gave an order to the officers to fire their shotguns with rubber bullets onto the ground towards the crowd. They did not use stun grenades or tear gas as those are only issued to the POP unit who were not present at the time. He testified further that the crowds were angry and furious, given that they were being stopped from burning the town down. At that stage the crowd was already armed with pangas, knopkieries and sticks. Fires were made in the streets, trees were set alight and tyres were hurled at the police. After the rubber bullets were fired, the crowd retreated initially about 50 to 60 metres but soon advanced forward again. The best they could do was to continue this process for a relatively long time in order to hold the crowd back from proceeding to the town until the POP unit could attend, who only arrived at around 08h00 or 09h00. He was very relieved when the POP unit arrived on the scene, stating in his own words that:

"[it is] their crowd.. its actually their job to do so".

At this time the police under his command retreated and the POP officers took over the scene. He testified that the methods he utilised to disperse or control the crowds were necessary because their lives were in danger as well as the community and property. Armed only with shotguns and 9mm pistols, they utilised the soft approach of firing with rubber bullets with a ricochet aim towards the crowd.

14] Fortuin testified that he was employed in the POP for 9 years from 1991 to 2000 and that the POP is a specialized SAPS unit, set up to maintain law and order during public demonstrations, whether it is a legal or illegal gathering. Although an illegal gathering would take the police force by surprise it remains an intelligence driven exercise in that officers need to maintain an ear to the ground approach. The SAPS, especially the POP, must be on the alert for possible strikes or unrest at all times. He confirmed his written statement wherein he stated that the SAPS was informed at 02h00 in the morning that Michaels was going to mobilise a group in protest, where the protesting crowd would gather and what the threats entailed. By the time he took action about 1 ½ hours had already passed, which he readily conceded was crucial in controlling the imminent danger.

Appreciating the extent of the threat and the duties of the police in these circumstances, Captain Josephs called upon the POP unit to attend. In light of the fact that he was informed that the POP unit do not have a night shift platoon on duty, he had to attend to the scene along with his members from the local police station. He conceded that had the POP unit been there around 04h00 or at the time when the police force arrived, the crowd would have been maintained in a different and more contained manner. He also conceded that if the POP unit had been available at the time when he called at 04h00, they ought to have been on the scene by 05h30. Even though he was informed that the POP do not have a night shift platoon, he was of the view that the members of the SAPS, including the POP unit, had to be on 24/7 standby.

15] Captain David Gideon ("Gideon") testified in chief that he is stationed at POP Boland. On the date in question there was no platoon available in the early hours of the morning as they would only have reported on duty at 06h00 that morning, hence they arrived in Grabouw around 07h30. He explained that the Boland POP unit had prior to 2010 been abandoned but as at the time of this incident, it had been re-established. Given the limitation of manpower, the platoon would work latest until 24h00 and start again at 06h00 the following morning. Only the operations room would remain functioning 24/7 with about 2 or 3 members. He testified that when the operations room is notified of an imminent unrest action, the members of the POP unit would be called upon to report for duty via the Station Commander. Though it would take time before the members could report for duty, it is indeed possible for the members to be called upon to report on duty in an emergency. He estimated that as the members of the unit are staying around the Boland area, they would be able to report within 2 to 2 ½ hours. At the time there were 50 members in the unit, under the command of Captain Graham, who had since passed. The unit was divided into 4 platoons, thus each platoon consisted of about 8 to 9 members. At the time of the incident, about 18 members could have been made available to deal with the capacity of the crowd on the date of the incident.

FINDINGS OF THE COURT A QUO:

16] The trial court found in favour of the appellant's version that she was struck by a ricocheted rubber bullet, as she was passing the crowd whilst walking on the side of the road. However, the court a quo reasoned that given that her case was pleaded squarely by placing the blame on the local SAPS members, who were on the scene at the time the appellant was injured, she cannot rely on a case made out at the trial in terms of which the respondent is held liable as a result of the absence of the POP unit. In the view of the court a quo, reference in the appellant's pleadings to the alleged failure by SAPS to avoid the shooting incident did not include reference to a dereliction of duty on the part of the POP unit which is a specialised unit of the SAPS. The court a quo held that without seeking to amend her particulars of claim to include the failure to deploy the POP unit, the evidence so led cannot be taken into account by the Court as the respondent was not afforded a proper opportunity to deal with that averment.

17] The court a quo reasoned that even when Gideon as head of the POP Boland testified that his members would have been able to be called out to the scene after Michaels alerted SAPS of the imminent protest, it would be prejudicial to the respondent to read it into the particulars of claim as same would not only cause prejudice to the respondent but would also prevent a full inquiry. In the result, the court a quo held that it did not have all the information to form an opinion on that aspect. Furthermore it held that the submission during the appellant's counsels opening address namely, that SAPS should have deployed specialised members/units to maintain law and order, which they failed to do, is not sufficient notice to the respondent of the case it would have had to meet. It held the view that it was fair to accept that the appellant intended to place the blame only on the Grabouw SAPS members who were on the scene on the morning of the incident. Consequently, the respondent's attention was directed to defend itself on that basis and to answer the case in regard thereto.

18] Whilst the court a quo also upheld the respondent's defences of necessity and voluntary assumption of risk, both parties' counsel accepted at the hearing hereof that the crux of this appeal rests against finding that the appellant's pleaded case does not permit adjudication on the issue that SAPS' dereliction of duty emanated from its failure to deploy specialised members/units, in this case the POP. I will deal with this issue in more detail below. I pause, however, to consider the applicable legal principles.

APPLICABLE LEGAL PRINCIPLES RELATING TO PLEADINGS:

19] Rule 18(4) of the Uniform Rules of Court states that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply to it.

20] In *Minister of Safety & Security v Slabbert* {2010J 2 All SA 474 (SCA) at para 22 the Court held that:

"{22) A court is not bound by pleadings if a particular issue was fully canvassed during the trial."

21] It is trite that the purpose of pleadings is to define the issues for the other party and the court. A party must allege in the pleadings the material facts it relies on. It is impermissible for an appellant to plead a particular case and seek to establish a different case at trial. It is equally not permissible for the trial court to have recourse to issues outside the pleadings when deciding a case.

22] Against the backdrop of these legal principles, I consider whether on the facts of this case, the appellant sought to establish a different case at trial or, on the other hand, whether the pleadings were couched wide enough to have incorporated therein any imputation or omission on the part of SAPS to have deployed the mobilisation of the POP unit.

ISSUE ON APPEAL:

23] The vexed question herein is whether the appellant had pleaded her case sufficiently in her particulars of claim to enable the defendant to plead to it. Stated differently, had the respondent been placed with sufficient particularity to enable it to reply to the material facts upon which the delictual claim of liability is based. The particulars of claim pleaded specifically that the police at the scene had failed in their duties to avert the harm caused to the appellant however also held SAPS liable in a broader sense of a dereliction of duty. The nub of the issue is whether the claim that the SAPS' failure to utilise all available resources responsibly was sufficient to cover the claim which had morphed at the trial. The issue of the specialised unit was first introduced by the appellant's counsel during the opening address, namely, that the presence of the POP would have prevented the appellant's injury. Paragraph 9.2 of the opening address heads of argument states that members of the SAPS failed to implement reasonable measures, including the deployment of specialised units to disperse a threatening crowd timeously, adequately, or at all. Evidence later followed through various testimonies that the POP ought to have been deployed and that it was indeed capable of being deployed to avert the ensuing danger.

24] The appellant contends that the court a quo erred when it failed to take into account her case against the respondent both as pleaded and as amplified in the evidence. The appellant further relies on the fact that her counsel had set out in the opening address more specifics as to the extent of the respondent's liability, in particular, that it had failed to employ the specialised unit to combat the threat of imminent public disorder and chaos.

25] It is argued for the respondent that had it been alerted by the appellant's pleaded case that the absence of the POP was the basis upon which its liability is premised, the respondent would have been able to ask trial particulars such as:

- i) which POPS unit had to be present?
- ii) how many POPS units would have been necessary to curtail the violence?
- iii) was a POPS unit on duty?
- iv) where were they stationed?

v) why were none on duty?

vi) could the presence of POPS unit have prevented the harm to the appellant?

These questions are set out as examples by the respondent's counsel as to questions which the respondent could have asked the appellant during the pleadings stage. In the absence of that opportunity, it is argued, the issue of the POP unit was not fully canvassed during the trial and the court was not expected to pronounce on it as an issue.

26] The appellant's cause of action is premised on both a commission and omission. During the course of the trial, it was debated whether, the evidence in chief of Matsemela and cross-examination of the witnesses for the respondent, as far as it relates to the POP unit, should have been cited in the particulars of claim to the extent that it operates separately from SAPS or that the pleadings ought specifically to have referred to the specialised unit in question. The court a quo considered the failure to do so fatal to the case of the appellant as the respondent would have in turn pleaded its case differently and in

the result it would be prejudicial to the respondent to be ambushed by the issue that its dereliction of duty emanates from the failure to deploy the specialised unit timeously.

DISCUSSION:

27] I consider the following aspects pertinent to this

determination.

Firstly, the POP unit is not a separate unit and remains part of SAPS pursuant to the provisions of Section 205 of the Constitution. Secondly, the evidence of Matsemela was that the POP unit should have been deployed, moreover so in that Michaels, a notorious and riotous community figure, had given warning of its intended protest action and is known to cause massive destruction whenever he embarked on his protest action. Thirdly, the evidence of the respondent's witnesses (Fortuin and Gideon) were that the POP was able to be called up to report. Both witnesses testified that if the POP unit had arrived earlier, on the probabilities, it would have defused the situation and consequently the injury to the appellant could have been avoided.

28] The question follows, had the particulars of claim specifically pleaded the deployment of the POP unit, how would the respondent have dealt with its case differently? It was its own witnesses who testified that the POP ought to have been deployed and was in fact able to be deployed. Undoubtedly it can safely be accepted that it was within the respondent's own knowledge that: (a) the specialised unit ought to have been deployed; (b) that it was capable to deploy at least 2 platoons; (c) the POP members would have been able to report at around 5am or so; and (d) that had it been so deployed, the protesting crowd would have been controlled and the appellant's injury caused by a rubber bullet averted.

29] The respondent submits that had the particulars of claim specifically referred to its failure to deploy its specialised unit, it could have requested trial particulars as referred to in paragraph 25 above. In the circumstance the respondent submits that the POP issue was not fully canvassed during the trial and consequently the trial court correctly did not take it into account in its pronouncement on the merits.

30] I find the respondent's argument highly problematic. The tenor of the further particulars which the respondent claims it could and would have called upon, so as to prepare for the case it had now been expected to meet, goes to the heart of the matter. To the extent that the particulars of claim avers that the respondent failed in its duty to utilise all its available resources responsibly to render a responsible and effective service of high quality, I am of the view that the pleading was sufficient to alert the respondent that it failed in its duty to have taken timeous steps to avoid the necessity of the force it used i.e. the rubber bullets, and that the use of that type of force was not its last resort. This was in fact pleaded. It was apparent throughout the evidence of the witnesses who are employed by the SAPS, that as soon as the "Michaels warning" was received at around 02h00, the POP unit was identified and called upon to deal with the type of threat of public violence and danger. This knee jerk realisation was evident to all the witnesses who are SAPS members. It certainly does not behove of the respondent to claim that in meeting this case, it was solely directing its attention to the actions of the Grabouw SAPS members on the scene.

31] In my view, it is a conveniently myopic view to entertain that it did not appreciate that the allegation of dereliction of duty also implies therewith the utilisation of its specialised unit to attend to the protest. Fortuin testified that he was relieved when the POP unit arrived at the scene as it was, as he says in his own words: "their crowd... its actually their job to do so." This is the view which all the SAPS witnesses had laboured under and I find it implausible that a claim of dereliction of duty would not have reasonably alerted the respondent that the absence of the POP unit at the time the appellant sustained the injury was implicated in its failure.

32] I am not persuaded that the respondent had been blindsided or ambushed. It was stated in the particulars that the respondent had a legal duty to protect the appellant which included utilising all its available resources. The construction of the claim is in my view broad enough and sufficient to cover the specialised public order unit as a resource which was available to it and by failure to deploy same, resulted in it not rendering a responsible and effective service of the quality expected of the SAPS. A specialised unit of the SAPS is not a separate unit and it remains part of the SAPS, under the ministry and responsibility of the respondent.

33] It bears mentioning that the respondent did not request further and better particulars. Pertinently, it did not request from the appellant how it is alleged to have failed to utilise all its available resources and what resources are specifically referred to. The respondent assumed incorrectly, and fatally so, that the particulars of claim is only referring to the resources available to the Grabouw SAPS members at the scene. In terms of Section 205 of the Constitution, the SAPS' policing objectives are to prevent, combat and investigate crime; maintain public order; protect and secure the inhabitants of South Africa and their property; and uphold and enforce the law.

Public order policing is the responsibility of SAPS and a claim against it that it had failed its duty in a number of ways, including utilising all its resources, is a material fact alleged (*facta probanda*). It follows that during the trial, the *facta probanda* would be required to be supported by pieces of evidence (*facta probantia*). Through various testimonies it was apparent that the respondent had in fact failed to utilise all its available resources, in particular, to place in deployment its POP unit as an available resource.

34] After information is received by the police about protest action or illegal gatherings, it is peremptory for the police to assess the threat level involved in order to identify the most suitable unit to manage such an event. It is clear from the evidence of the SAPS witnesses that the police officer who acted upon the Michael's warning, namely Captain Josephs, identified the POP unit as early as approximately 02h00 as the suitable component of the SAPS to manage the pending protest. This awareness prevails throughout the unfolding events. Fortuin also accepted the threat to be at level 3 and held the view that the POP unit would be the appropriate SAPS component to manage the proposed event. Not only was the threat level known to SAPS as early as 02h00 but its members also appreciated that it would be hopelessly outnumbered by the extent of the crowd and the nature of the threatened actions which mandated the attention of its specialised unit to ensure public order policing. It follows that as and when the local police officers resorted to force by way of rubber bullets, the SAPS had not in fact invoked all efforts to avoid such force. The POP would have been able to competently deal with such a crowd and with less invasive measures, such as teargas, water cannon and stun grenades: however it was not deployed.

35] In these circumstances, I am of the view that the pleadings were couched widely enough to incorporate the respondent's statutory duty of care with special reference to section 205 of the Constitution, which includes public order policing. I cannot in these circumstances find that the case made out in the pleadings are varied from that made out in the evidence, or that a variation or exploration was impermissible, to the extent that it amounted to different cases or that it had amounted to ambushing the respondent.

36] In any event, I am satisfied that the issue of the POP unit was fully canvassed during the trial even though it was not specifically pleaded. Faced with the evidence which established that the POP unit ought to have been deployed at the scene in the early hours of the morning, the respondent was in a position to seek a postponement to rebut evidence that such deployment was not available to the respondent on the date in question. Instead it proceeded with its defence in the face of testimony from its police members and also its own witnesses that the POP unit ought to have been deployed to avoid the chaos and injury which had erupted.

37] In *Sentrachem Bpk v Wenhold* [1995] 2 All SA 524 (A) the court referred to *Shill v Milner* 1937 AD 101 at 105 in which it was stated that

"The importance of pleading 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 the 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 the appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."

In *Trellicor (Pty) Ltd t/a Trelidor v National Union of Metalworkers of SA ("NUMSA") obo Ndwalane and others* [2022] JOL 53168 (LAC) at 11 it was stated that:

"It is a trite principle that litigants are to be restricted to the issues defined in pleadings. Other issues which are not defined in the pleadings do not have to be decided unless they were fully canvassed without objection in the evidence."

38] The court a quo found Gideon's testimony in respect of the POP unit "sparse" together with the view that the opening address was not borne out by the pleaded case and on that basis dismissed the case made out in regard thereto. I respectfully disagree. An overly technical approach would lead to an unjust finding moreover considering that the respondent herein is not an ordinary litigant. The SAPS is a constitutionally mandated unit and a specialised institution to maintain law and order, combat and investigate crime etc. It is trained in its functions and duties. Public order is one of society's most basic needs. The most important function of any policing agency is to maintain public order and stability. Importantly, the issue of the POP unit is not a new cause of action. Pleadings must be interpreted benevolently when considering whether the cause of action had been established. The pleading must be considered holistically without reading paragraphs in isolation.

39] The question follows hereafter whether the deployment of the POP unit was canvassed at trial and if so, if it can be held that it was sufficiently canvassed. If not, a Court would be countenancing a case by ambush. However, in casu and throughout the trial, it was evident that the threat posed was at the most serious level which warranted and compelled the attendance and intervention of the public order specialised unit of the SAPS. This was not in dispute. It was further not disputed that whilst this specialised unit was not on duty, its members could be called to report and would be in attendance within 2 to 2 ½ hours, which made it possible for the POP members to attend at the scene around 5 am and well within the time frame to have avoided the chaos which led to the appellant's injury around 6h30am to 6h45am.

40] It was established during the trial that most likely the protesting crowd would have been contained by the POP unit as opposed to 10 members of the local police who were severely outnumbered and had to make use of shooting rubber bullets to disperse the fierce crowd. Whilst the local police had to attend to the protest, they were not equipped to deal therewith. Firstly, they were not trained to deal with public order policing. Secondly, they were not provided with the manpower. Thirdly, they were not provided with other lesser force ammunition such as teargas, stun grenades or water cannons.

41] With those aspects ventilated, I find it difficult to conclude that the issue had not been fully canvassed at trial. The respondent proceeded with its defence without seeking to rebut the evidence supporting the plaintiff's claim and in those circumstances it cannot be said that the matter was not fully canvassed by both sides. The opportunity was available to the respondent to deal with that aspect further, if it considered same necessary. In the result, the trial court ought not to have dismissed this evidence nor turn a blind eye thereto.

42] This leaves me to consider the respondent's defence of necessity. It is evident from the chronology of events, facts which were not disputed during the trial, that the respondent created the situation by failing to have the POP unit available and attend at the scene earlier, at around 05h00, which would have managed the protest and most probably have prevented the appellant's sustained injury.

43] Had the police members ensured that the POP unit had been deployed and present at the scene, the appellant on the probabilities would not have been shot as the POP unit would have taken control of the situation and controlled the crowd with the means at their disposal and without the necessity of rubber bullets being fired. Having not taken sufficient precautions to protect innocent members of the public, the respondent cannot rely on the defence of necessity. Its reliance on a defence that its local police members had to resort to the firing of rubber bullets, is by all accounts self- created. The harm which had followed could and would have been averted with the realistic alternate measure which was available to it.[1]

44] For the sake of completeness, I deal with the defence of voluntary assumption of risk as upheld by the court a quo. The appellant was not cross-examined about her prior knowledge of the illegal protest. Her version was that at the time she crossed the road and walked to the left of the gathering. Protesters were toy-toying and singing. It was never put to the appellant that prior to her crossing the road, en route to the college, that shots had been fired. Whether the appellant had knowledge of the risk requires an objective assessment of the facts to establish what inherent risks existed and further too a finding that the appellant foresaw the actual risk that she could be shot and injured. Accordingly, it cannot be said that the appellant had knowledge of the risk of injury, appreciated the risk and consented to such risk.

CONCLUSION:

45] I am satisfied that neither the defence of necessity nor voluntary assumption of risk is available to the respondent.

46] For the

reasons

aforesaid, it follows that the court a quo erred in dismissing the appellant's claim against the respondent. Accordingly, I would set aside the order of the court a quo and replace it with an order set out below.

47] As regards to the costs in this appeal, I am satisfied that the

issues

raised were extensive and the evidence voluminous warranting costs on the basis of two counsel, where same were employed.

48] In the result, I would propose the following order:

- (i) The appeal is upheld with costs including the costs of two counsel.
- (ii) The order by the court a quo is set aside and replaced with an order in the following terms:

"1. The defendant is held liable for the damages that the plaintiff has suffered in consequence of the incident which occurred on 10 August 2011 when she was struck in the right eye by a rubber bullet fired by a South African Police official.

2. The defendant is ordered to pay the plaintiff's costs.

3. The matter is postponed sine die for the determination of quantum."

SALIE, J

JUDGE OF THE HIGH COURT

WESTERN CAPE

I AGREE AND IT IS SO ORDERED:

DOLAMO, J

HENNEY, J:

Introduction:

- [1] I have had the benefit of reading the judgment, drafted by my colleague Salie J, which I shall refer to as the first judgment. I am indebted to her for thoroughly dealing with the evidence and her characterisation of the issues underlying this appeal. Regrettably, I am unable to agree with her reasoning, findings and conclusion that the appeal should be upheld with costs for the reasons that will follow in this judgment.
- [2] The issue, as pointed out in the first judgment, to be determined in this appeal deals with the question whether the appellant pleaded her case sufficiently in her particulars of claim in order for the court a quo to have sustained her claim based on the evidence. This includes examining whether the allegation - that the omission of the South African Police Service ("SAPS") to deploy the services of the Public Order Policing Services ("POPS") unit was a failure to use all available resources and constituted a breach of their duty of care, that would result in her suffering harm and consequent damages - was incorporated in the

particulars of claim under paragraph 6 and 7.

- [3] I agree with my colleague that as a starting point, when a court deals with a question that relates to the sufficiency of a pleading it would be proper to have regard to the rules relating to pleadings as set out in Rule 18 and in particular rule 18(4), which states that:

'Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.' (own emphasis). I shall at a later stage in this judgment, comprehensively refer to provisions relating to pleadings which find application in this matter.

The Relevant Provisions of the Particulars of Claim:

- [4] At this stage it would be appropriate to deal with the relevant provisions of the particulars of claim. Under paragraph 6 and paragraph 7, the appellant broadly and in a generalized and unspecified manner states the obligations and functions of the SAPS members. In paragraph 6 the plaintiff states that '[a]t all material times the SAPS members were obliged by the Preamble and section 14 the South African Police Services Act 68 of 1995... to ensure the Plaintiff's safety and security, to uphold and safeguard the plaintiff's fundamental rights as guaranteed by chapter 3 of the Constitution including her right to dignity, life and freedom and security, as set out in sections 10, 11 and 12 of the

Constitution... and to preserve the Plaintiff's life and health'.

- [5] Under paragraph 7 of the particulars of claim, the plaintiff refers to the SAPS Code of Conduct and states the following:

'Further, and at all material times, the said SAPS members were obliged, by virtue of the SAPS Code of Conduct. to create a safe and secure environment for the Plaintiff, to prevent action(s) which may threaten the safety or security of the Plaintiff, to uphold the Constitution and the law, to render responsible and effective service of high quality, to utilize all available resources responsibly, efficiently and cost effectively to maximize their use, to uphold and protect the fundamental rights of the Plaintiff, to act transparently and in an accountable manner, and to exercise the powers conferred upon them in a responsible and controlled manner, a copy of the said code of conduct is annexed hereto marked "POC2"'.

- [6] Under paragraph 8 under the heading: 'The Facts: - Unlawful Assault', the following is stated:

'On Wednesday, 10 August 2011 and at approximately 06h15 near to the corner of Old Cape and Industrial Roads, opposite the Grabouw Clinic, Grabouw, whilst Plaintiff was on her way to Boland College, Caledon, where she was studying electrical engineering at the time, she was, wrongfully, unlawfully, alternatively maliciously, alternatively further, negligently and without just or probable cause, shot by members of the South African police services('SAPS'? whose was full and further particulars are to Plaintiff unknown.'

[7] Under paragraph 9, the plaintiff states the following:

'The aforesaid shooting incident was occasioned by the wrongful and unlawful, alternatively malicious, alternatively further, negligence of the employee(s) of the Defendant, in that he/she/they:

9.1 Failed to handle their firearm(s) with the proper consideration of the safety of the members of the public;

9.2 Failed to properly handle a firearm, which was loaded with ammunition;

9.3 Failed to avoid the shooting incident aforestated when, by the exercise of reasonable care, he/she could have, and should have done so.'

[8] Under paragraph 10, the following is pleaded:

'In and as a result of the aforesaid shooting, the Plaintiff sustained a gunshot wound to her right eye, as more fully set out in paragraph 16 hereunder.'

[9] Under paragraph 12 the Plaintiff alleged that the defendant's duty of care was based on the following fact that '[a]t all material times hereto, the said member(s) of the SAPS were obliged to adhere to the SAPS Services Act, the SAPS Code of Conduct, a common law duty, as well as a Constitutional obligation, i.e. owed Plaintiff a duty of care, as follows:

12.1 Not to abuse their powers as police officers;

12.2 Not to act with deliberate/negligent indifference to the health and safety of the Plaintiff;

12.3 To exercise control of their actions;

12.4 Not to randomly open fire at members of the public, including the Plaintiff, and in a reckless and/or negligent manner without first establishing that it is safe to do so.

[10] Under paragraph 13,14 and 15, the plaintiff alleges that the defendant breached its duty of care in the following respects:

That in breaching its duty of care '...the aforesaid member(s) of the SAPS wrongfully, unlawfully assaulted plaintiff as aforestated, alternatively, maliciously alternatively further, negligently, and without just or reasonable/probable cause breached the SAPS Act, the Constitution, the SAPS Code of Conduct, their common law duty and the aforesaid duties of care set out herein, in one or more of the following respects in that he/she/they:

13.1 randomly fired rubber bullets at members of the public, including the Plaintiff;

13.2 endanger the plaintiff's life;

13.3 disregarded the plaintiff's right to privacy;

13.4 disregarded the plaintiff's right to be treated with dignity;

13.5 abused their powers as members of SAPS as described above herein; and

13.6 acted with deliberate indifference to plaintiff's health and safety'.

[11] Under paragraph 14 the plaintiff further alleges that in the circumstances, the said members of the SAPS wrongfully and unlawfully, alternatively, maliciously, alternatively further,

negligently failed to perform one or more or all the aforesaid duties, including duties of care owed to the plaintiff as set out

above herein'.

[12] Under paragraph 15, the plaintiff states '[a]s a further direct consequence of the aforesaid acts and/or omissions by the said member(s) of the SAPS should reasonably have foreseen that the failure to perform one or more or all the aforesaid duties, set out hereinabove would result in Plaintiff being shot, as aforesaid, which they failed to do'.

Discussion:

[13] Before dealing with the issue that forms the subject of this appeal, it would be appropriate to restate and discuss the rules relating to pleadings in similar cases with particular reference to Erasmus[2] Civil Practice in the Superior Courts, in order to have proper insight in the issues germane to this appeal.

Erasmus succinctly summarizes the rules relating to pleadings in general under their discussion of rule 18. I deem it appropriate to restate and paraphrase some of the principles as stated by the learned authors, which is:

13.1 Pleadings are the written statements of the parties served by each party in turn upon the other which must set out in summary form the material facts on which each party relies in support of his claim or defence, as the case may be;

13.2 The object of pleadings is to define the issues so as to enable the other party (and the court) to know what case has to be met;

13.3 It is indeed a basic principle that a pleading should be so phrased that the other party may reasonably and fairly be required to plead thereto;

13.4 The parties are limited to their pleadings; a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvas another. For this reason and to prevent surprise, pleadings must be articulate and sound; the cause of action or defence must appear clearly from the factual allegations made;

13.5 However, since pleadings are made for the court not the court for the pleadings, it is the duty of the court to determine what are the real issues between the parties and, provided no possible prejudice can be caused to either party, to decide the case on these real issues. In this regard the court has a wide discretion. The court must look at the substantial issues between the parties and cannot blindly follow the ipsissima verba of the pleadings. In this regard the authors state that the Appellate Division[3] has, however, warned that parties should not be encouraged to rely on

the court's readiness to consider and deal with unpleaded issues, to which I will refer to at a later stage;

13.6 The cardinal rules in regard to pleadings should be properly observed, and the trial should not be allowed to become a 'free for all' with a complete disregard of the issues raised on the pleadings;

13.7 The court is not bound by the pleadings if the parties themselves at the trial enlarge the issues; The general principle, however, is that the parties will be held to the issues pleaded unless there has been a full investigation of a matter falling outside the pleadings and there is no reasonable ground for thinking that further examinations of the facts might lead to a different conclusion.

[14] In terms of subrule 4, the material facts relied upon must be set out both clearly and concisely. In a summons only material facts and not evidence must be pleaded and during this process *facta probanda* (the facts that had to be proved) and *facta probantia* (the facts that would prove those facts) should be kept in mind. The authors further states that for the sake of clarity it is sometimes

necessary to plead history, but this should be done with caution unless the history is clearly severed from the cause of action.

[15] The first duty is that the pleader must set out the facts on which he or she relies for his or her claim. In other words, they must be such that the relief prayed for flows from them and can properly be granted. The facts must constitute the premise for the relief sought.

[16] The plaintiff must also set out details of the relief it seeks. In other words the summons must give sufficient indication of the remedy sought by the plaintiff so that the defendant knows what order the court is being asked to make against him.

[17] The term 'sufficient particularity to enable the opposite party to reply thereto' means that it relates to the pleading of facts which make up either a claim, a defence or an answer. Such facts must be pleaded with sufficient particularity to enable the opposing party to reply thereto (and in the case of a plea, to enable the plaintiff

who considers an application for summary judgment to determine whether or not the defence as pleaded raises any issue for the trial). It is a basic principle that a pleading should be so phrased that the other party may reasonably and fairly be required to plead thereto. Pleadings must be lucid and logical and in an intelligible form; the cause of action must appear clearly from the factual allegations made.

[18] There is no exhaustive test to determine whether a pleading contains 'sufficient particularity' for the purposes of this subrule, but it is essentially an issue of fact: a pleading contains sufficient particularity if it identifies and defines the issues in such a way that enables the opposite party to know what they are. The degree of particularity will depend upon the circumstances of each case.

- [19] At the commencement of the trial and prior to any evidence being led, Mr. Salie in his opening address in setting out the case for the appellant, submitted that it is the appellant's case that:
- a) The members of the SAPS were accordingly under a legal duty to take care not to injure or harm innocent persons and ought to have acted with extreme caution and the force only as a last resort;
 - b) The members of the SAPS failed to implement reasonable measures, including the deployment of specialised units to disperse a threatening crowd timeously, adequately, or at all;
 - c) Members of the SAPS failed to use less forceful and/lethal means, other than the firing of rubber bullets;
 - d) Members of the SAPS failed to disperse the protesters prior to the protesters becoming threatening and/or threatened the safety of members of the public and/or the property; and thereby failed to preserve law and order;
 - e) It is the Plaintiff's case that the SAPS failed to take timeous steps to avoid the necessary use of force, i.e., by firing rubber bullets, when, by the exercise of reasonable care they could and should have done so;
 - f) The Plaintiff will deny that the firing of rubber bullets into the protesters was the only means of averting a danger to both the members of the SAPS and/or the public, more particularly, the appellant and that the SAPS failed to use less forceful means, e.g. by using teargas, stun grenades and/or water cannons;
 - g) On the defendant's own admission between the hours 2:00 and 3:00 the group of protesters were growing larger and SAPS should have deployed specialised units to maintain law and order, which they failed to do;
 - h) The Plaintiff further denied that the members of SAPS had acted as a matter of necessity as pleaded by the defendant.
- [20] It is common cause in these proceedings that the submissions made by Mr. Salie were not specifically pleaded and did not form part of the material facts upon which the plaintiff relied to sustain her claim.; it did not form part of the *facta probanda*. No factual allegations upon which a failure to comply with the provisions of the Code of Conduct, and the SAPS Act were pleaded.
- [21] During the trial, when Mr. Salie cross-examined Fortuin, a police witness and raised this issue that was in direct contrast with the version of the plaintiff regarding the situation that prevailed on that specific morning which led to the shooting incident. He informed the court that the line of questioning to the witness was based on the allegations made in paragraph 6 and 7 of the particulars of claim as referred to above. He further stated that with

this line of questioning, they 'are testing the defendant's version about available resources'. In this regard, he further stated[4] '...And we say it is widely couched, M'Lady to include the units that we have been driving from day 1 of the hearing. So, if M'ladyship is with us that the construction is wide enough, and we make the point, my co-counsellor drafted the particulars then, effective service of high quality and to utilize all resources responsibly, efficiently and cost effectively would certainly include the employment of any unit within SAPS force to uphold the dignity and physical integrity as we say there...'

- [22] He further stated that by asking these questions, they are testing the version of the defendant on their own version because they have pleaded and assumed that there is negligence for which the Plaintiff shall be partly to be blamed.
- [23] Mr O'Brien during this interaction, objected to this line of questioning and stated in respect of paragraphs 6 and 7 of the particulars of claim, the plaintiff only sets out the law and no facts upon which she states that these paragraphs are applicable. He further stated that the plaintiff is bound by the pleadings.
- [24] He further submitted that if the plaintiff avers that the respondent should have employed the service of the POPS unit or that they should have called for the assistance of other police stations, she did not lay any factual basis for such a contention. The respondent did not prepare their case or a defence based on these allegations. During the hearing of this appeal, he persisted with these submissions.
- [25] Mr. Salie submitted, that the appellant by having incorporated paragraph 6 and 7 that deals with the obligations of the respondent in terms of the Constitution, more especially in terms of sections 10, 11 and 12 the SAPS Act, which places a duty on its members to ensure the safety and security and to uphold the fundamental rights to dignity, life and freedom of security.
- [26] Furthermore, the obligations of SAPS in terms of the SAPS Code of Conduct, as pleaded in paragraph 7 of the particulars of claim, is to create a safe and secure environment, to prevent actions which may threaten the safety or security of the plaintiff, and once again, to uphold the Constitution and the law which included to render a responsible and effective service. This further included 'to utilize all the available resources responsibly, efficiently and cost effectively to maximize their use, to uphold and protect the fundamental rights of the plaintiff.
- [27] Mr. Salie submits that by having made reference to these broad provisions of the Constitution, the SAPS Code of Conduct and the SAPS Act in these two paragraphs of the particulars of claim, the pleadings were widely couched to also incorporate a duty of care to implement reasonable measures, which included the deployment of specialised units to disperse a threatening crowd timelessly, adequately or at all. This would have enabled them to disperse the protesters prior to them becoming a threat to the safety of members of the public and property; it would not have required them to fire rubber bullets at the protesters as the only means of averting danger to both the members of the SAPS, members of the

public and more particularly, the appellant.

- [28] Lastly, he submitted that the SAPS failed to use less forceful means by using teargas, stun grenades and/or water cannons. Whilst they knew, by their own admission, that the group of protesters were growing larger between 2 AM and 3 AM, they should have deployed specialised members/units to maintain law and order which they failed to do.
- [29] Nowhere in the particulars of claim were these facts specifically pleaded and formed part of a clear and concise statement of the material facts. Especially those facts that were set out by Mr. Salie prior to the leading of evidence in his opening address. The specific averments upon which the unlawful conduct of the respondent was alleged is set out in paragraph 9 of the particulars of claim. It further did not form part of the grounds as set out in paragraph 13 where it sets out the how and in what respects the respondent breached its duty of care. It did not specifically mention that the respondent, by its failure to activate the services of the POPS unit, breached its duty of care.
- [30] Nowhere was it specifically stated that the members of the SAPS failed to implement reasonable measures, including the deployment of specialised units to disperse a threatening crowd timeously, adequately or at all. It also did not state that the members of the SAPS failed to use less forceful and or lethal means, other than firing rubber bullets. Moreover, it did not state that firing rubber bullets into the protesters was not the only means of averting danger to both the members of the SAPS, members of the public and more particularly, the appellant. In this regard the pleadings of the appellant clearly lacks clarity. At best, the pleadings make a bare and generalized reference to the legal prescripts, the SAPS Code of Conduct and the Constitution as stated in paragraph 6 and 7, without referring to the material facts which set the applicability of these legal and statutory provisions in motion, to justify an allegation that there was a breach of a legal or statutory duty.
- [31] It is impermissible to couch a pleading in such a manner. In *Trope v South African Reserve Bank*[5] the following was said by McCreath J regarding this manner on pleading:

'Whilst it is not necessary, nor indeed appropriate, to plead policy considerations or the boni mores, it is incumbent on a plaintiff to plead all the facts on which he wishes to rely to enable the Court to decide whether policy considerations and the boni mores warrant that liability should extend to the case in question. That much is apparent from cases such as the *Lillicrap* case *supra* and *Natal Fresh Produce Growers Association and Others v Agroserve (Pty) Ltd and Others* 1990 (4) SA 749 (N) at 758F. And if the pleadings lack sufficient clarity to enable the defendant to determine those facts and hence the case he has to meet, the pleadings are vague and embarrassing. That is so whether the facts are of a statutory or common-law nature. A bare reference to a statute or set of regulations, without specifying the particular section or regulation on which reliance is placed or the facts which enable the section or regulation to be identified, cannot in my view suffice: and that must be so whether the statute or regulations are the only facts relied upon to fix the defendant with liability or whether they are but one of the factors to

be considered in conjunction with any other facts on which reliance is placed (cf Minister van Polisie v Ewels 1975 (3) SA 590 (A)).' (own underlining)

[32] No facts were alleged upon which a breach of any of these provisions were based. These facts which formed the *facta probanda* (the facts that had to be proved) were simply not alleged. These facts i.e. that the SAPS failed to implement reasonable measures, which would have included the activation of the deployment of specialised units to disperse a threatening crowd timeously, adequately or at all; that the SAPS members failed to use less forceful and/or lethal means other than firing rubber bullets, were simply not alleged.

[33] Thus, the HAL obo MML v MEG Health Free State[6] matter deals with the question of clarity of a pleading especially with regards to the basis upon which an allegation of negligence is made. Wallis JA stated the following[7]: '... One can allow a measure of generality in pleading allegations of negligence, but simply to allege everything the pleader can conjure

up as potential negligence is unacceptable. There needs to be clarity as to the case being made and the nature of the impugned conduct on the part of the defendant, or those for whose conduct the defendant is said to be liable, who must at the least be identifiable.' (own underlining)

Wallis JA further stated that 'This diffuse, unfocussed approach to the conduct of complex litigation is to be deprecated. If the issues are not properly and clearly defined the conduct of the trial cannot be controlled in a properly efficient manner'.[8] (own emphasis)

[34] Mr. Salie for the very first time raised these facts as stated earlier, in his opening address to court, and it has never formed part of the pleadings. Thereafter evidence was led about these issues without it having been pleaded. The court a quo was correct to state that in taking this course of action 'it overlooks the specific grounds upon which the plaintiff pleaded that the "said SAPS members" -i.e. those stationed at Grabouw were on the scene at the time the plaintiff was injured, and not the POPS unit breached their duty of care towards her as set out in paragraph 2 of this judgement'.

[35] The court a quo was also correct in stating that '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 exercise of reasonable care, they could and should have done so'.

[36] The court a quo found that 'this in turn led the plaintiff relying on what appears to have been a dereliction of duty on the part of the POPS unit, but without seeking to amend the particulars of claim to that effect despite this being pertinently raised by the court during Fortuin's testimony'.

[37] The court a quo was also correct to state that the pleading of law (i.e. the SAPS Act and the Code of Conduct) provided no factual basis for the respondent to be alerted to the case it would later be required to meet. I agree with the court a quo that had the respondent been presented with the appellant's reliance on POP's apparent dereliction of duty from the outset, the respondent may well have approached its defence in a different manner, and

even if the later amendment was introduced and allowed, the respondent would have been offered a proper opportunity to deal with it even if this caused a postponement.

[38] What the appellant did was to plead the particular case and sought to establish a different case at the trial. In *Minister of Safety and Security v S/abbert*[9] the following was said: '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'.

[39] The appellant relies on the exception to this rule as stated in the *Slabbert* case where the court stated '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 with the issue in question has been canvassed fully by both sides at the trial. In *South British Insurance Co Ltd v Unicom Shipping Lines*, - the 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".[10]

[40] In *Slabbert*[11] the court stated '[if]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'. In this particular case, there was no unanimity as to whether this point was fully canvassed by both parties. It is clear that the appellant raised this new issue impermissibly at the eleventh hour prior to the commencement of the trial, without due notice to the respondent. Clearly, had the respondent been alerted that this would have been the appellant's pleaded case, which on the particulars of claim as shown earlier on, it was not, the respondent would have been able and entitled to request trial particulars regarding this particular averment.

[41] It was not a fortuitous discovery of new evidence during the trial that would have justified the raising of a new issue to call for an amendment of the pleadings, which the appellants refused to apply for, but a deliberate strategy to place this evidence before court and to attempt to create an impression that this issue was always raised in the pleadings under paragraph 6 and 7. This is clearly not a situation that was foreseen in the *Slabbert* decision. This is clearly not a situation that the Supreme Court of Appeal in *Slabbert* would have approved of and it is in stark contrast with what is expected of a litigant conducting his or her case in civil proceedings. This was clearly a case of trial by stealth or ambush.

[42] It is clear that prior to the start of the proceedings it was the intention of the appellant's counsel to raise the issue that the absence of the POPS unit would be used as a ground on which the respondent's liability is based, because this was immediately raised in his opening address. This took the respondent completely by surprise, and there was even an objection to these issues being raised during evidence. From that moment on the appellant's case morphed from the case pleaded into the one that the appellant now wants it to be.

[43] Furthermore , the appellant's legal representative knew right from the onset that they would present such evidence because officer Matsemala, who was an eyewitness and stationed at the Grabouw police station at the time of the incident, had in the meantime taken up a position in the POPS unit and it was during her testimony it seems that the appellant's counsel started to lay a basis for the proposition that the absence of the POPS unit was critical to establish the respondents liability.

During the evidence of Fortuin and Moos under cross examination, this line of questioning was purposefully pursued to establish the case that there has been a dereliction of duty on the part of the POPS unit, which led to a breach of duty of care.

[44] These facts, together with the bare and generalised references to a pleading of law, with reference to the SAPS Act and the Code of Conduct, were used to shoehorn a plea under the guise that the respondent failed to comply with a legal duty that was not specifically stated from the outset; which is that by failing to deploy the POPS unit, the respondent failed to make use of all available resources and consequently failed to comply with the provisions of the SAPS Act and Code of Conduct and in so doing, breached its duty of care.

[45] Evidence was led without prior notice to the respondent, .to illustrate non- compliance with the SAPS Act and Code of Conduct. This was done in order to demonstrate that there was a breach of the duty of care without material facts pleaded in the particulars of claim, to establish a cause of action based on the claim not pleaded. It is apparent that the appellant strategically raised this issue, having known that it was not specifically pleaded, as it raised the issue immediately prior to the start of the trial, in an effort to gain a tactical advantage. In the Middleton matter[12] Schreiner JA states the following: '... Generally speaking the issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage or of avoiding a special order as to costs, on the court's readiness at the argument stage or on appeal to treat unpleaded issues as having been fully investigated'. A litigant cannot, without prior warning through the back door place facts before the court and in an attempt to force the court into a situation to accept that those facts were now before court and should be adjudicated upon. This was done by using the generalized and unsubstantiated legal prescripts applicable to the South African Police Services (SAPS Act and the SAPS Code of Conduct) as set out in paragraphs 6 and 7 of the particulars of claim to shoehorn those facts into a perceived pleaded case, in order to gain an unfair tactical advantage over the respondent. This was clearly prejudicial to the respondent and should be deprecated. And impermissible and a litigant cannot be allowed to embark on such a course of action. It is for reasons that I disagree with the first judgment.

[46] The court a quo was correct in my view not to sustain the cause of action based on circumstances where the appellant pleaded a particular case and sought to establish a different case at the trial. For all of these reasons, the appeal falls to be dismissed with costs.

[47] In the result therefore, I make the following order:

"That the appeal is dismissed with costs".

R.C.A HENNEY

- [1] See also *Abrahams v Minister of Safety and Security* [2001] JOL 8996 (NJ p13-14
- [2] *DE Van Loggerenberg*; Superior Court Practise RS 21-2023 at 01228- 01-244
- [3] With reference with *Middleton v Carr* 1949 (2) 374 (A) at 386, *Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd* 1975(1) SA 161 at 162A; *Woodways CC v Vallie* 2010(6) SA 136 (WCC) at 142 A-8.
- [4] Record page 326
- [5] 1992(3) SA 208 (T) at 214 D-H
- [6] 2022(3) SA 571 (SCA)
- [7] HAL obo MML Supra at para 193
- [8] Supra at para 198
- [9] (2010) 2 All SA 474 (SCA) at para 11
- [10] Slabbert supra at para 12
- [11] Supra at para 13
- [12] Supra at para 386

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Prepared on 12 October 2026 · Esheria