
SOUTH AFRICA / JUDGMENT

Phawe and Others v Minister of Police (1403; 1404/2016; 1405/2016) [2019] ZANWHC 51 (28 November 2019) [2019] ZANWHC 51

COURT

North West High Court, Mafikeng

BEFORE

N G Laubscher

CASE / FILE NUMBER

1403/2016; 1404/2016; 1405/2016

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO.: 1403/2016

1404/2016

1405/2016

In the matter between:-

BEN MOHALE PHAWE

1ST Plaintiff

DAVID MABUZA

2ND Plaintiff

JAN MARCUS PHAWE

3RD Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

LAUBSCHER AJ

THE ISSUES TO BE ADJUDICATED, THE PARTIES AND THE RELEVANT BACKGROUND TO THIS MATTER

- [1] This judgement deals with three separate action proceedings launched respectively under case numbers 1403/2016, 1404/2016 and 1405/2016 by the First, Second and Third Plaintiffs, as single plaintiffs in each of the actions. The Defendant is the same defendant in all three of the actions, to wit the MINISTER OF POLICE OF THE REPUBLIC OF SOUTH AFRICA cited herein in his official capacity as the Minister responsible for the South African Police Service. Also similar to all three actions are the circumstances and the facts from which the three plaintiffs' claims arose. For the purposes of this judgement the issues which stand to be adjudicated in the three actions are *pari passu*.
- [2] The Court was requested to deal with the three matters simultaneously and the judgement of the Court shall apply to all three actions. The parties also agreed that only the merits of the three matters stand to be adjudicated at this point in time.
- [3] For the sake of practicality the Court shall refer to BEN MOHALE PHAWE as the First Plaintiff, to DAVID MABUZA as the Second Plaintiff and to JAN MARCUS PHAWE as the Third Plaintiff (also collectively referred to as "the Plaintiffs").
- [4] Mr Montshiwa appeared on behalf of the Plaintiffs and Me Williams appeared on behalf of the Defendant. Subsequent to the hearing of evidence in the matter the parties were requested by the Court to file written heads of argument, which was done and the contents of which assisted the Court in adjudicating this matter.
- [5] The matter emanates from events which transpired during the course of a labour strike which took place on inter alia 29 March 2016 at and near the premises of Botshelo Mills near Delareyville in the North West Province. The Plaintiffs averred in their particulars of claim that they were unlawfully and wrongfully assaulted by unknown members of the South African Police Service, who were said to be from the Mahikeng Public Order Policing Unit and who were at the time acting in the course and scope of their employment with the Defendant.
- [6] The Plaintiffs allegedly sustained injuries as a result of "...being shot at with rubber bullet..." by the police officials and being "...pepper sprayed and assaulted with bare hands". This detail of the alleged assault and cause of the injuries which the Plaintiffs have allegedly sustained is evident from the contents of paragraph 3 of the "NOTICE IN TERMS OF SECTION 3(1)(A) OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2002" which was annexed as Annexure "A" to the Plaintiffs respective particulars of claim.

THE CONTENTS OF THE PLEADINGS

- [7] The Plaintiffs stated in paragraph 4 of their particulars of claim that: “On or about the 29th March 2016 at or near Delareyville in the North West Province, the Plaintiff was unlawfully and wrongfully assaulted by unknown members of the South African Police Services (“the Members”), who were said to be from Mahikeng Public Order Policing, who were at the time acting in the course and scope of their employment with the Defendant, on the allegations and or charge of Public Violence without any evidence of such violence.”
- [8] The Defendant, by means of an amended plea which was delivered on 31 May 2019, admitted the assault “...by members of the South African Police Service who were from the Mahikeng Public Order Policing and that they were acting in the course and scope of their employment with the Defendant...”. The Defendant proceeded to plead in paragraph 3 of his amended plea, dealing with the above quoted paragraph 4 of the Plaintiffs’ particulars of claim, that the Defendant:

“...denies that the assault was unlawful and wrongful and pleads that the assault was lawful and that the actions of the members were reasonable in the circumstances and were justified by necessity.

The Defendant states that the Complainant obtained a court order which interdicted striking workers from coming within 500 meters of the main gate of the Complainant, preventing non-striking workers from reporting for duty, blocking the entrance to the Complainant’s premises, assaulting or threatening non-striking workers.

Despite the court order the workers refused to move away from the main gate entrance to allow non-striking workers to exit the premises.

The Defendant further states that the Police has a duty to prevent and combat crime and to maintain public order and may use minimum force which is reasonable in the circumstances.” (Court’s emphasis)

- [9] In paragraph 6 of the particulars of claim the Plaintiffs pleaded that:

“The aforesaid Members of the South African Police Service; -

6.1 were at all material times hereto, alternatively at the time of the assault acting within the course and scope of their employment with the Defendant and or alternatively furthering the interest of the Defendant;

6.2 acted without any reasonable and or probable cause, nor did they have any reasonable belief in the veracity or truthfulness of the information at their disposal or which they might have received from the complainant (if any) which might have caused or influenced them to assault Plaintiff;

6.3 failed and or neglected and or refused to properly investigate the case of Public Violence levelled against the Plaintiff before assaulting him;

6.4 failed and or neglected to ensure that there is sufficient evidence or proof which justified the assault, as the Plaintiff was not confronted at the alleged location of the commission of the offence.”

[10] To the aforestated contents of paragraph 6 of the Plaintiffs’ particulars of claim, the Defendant, in paragraph 5 of his amended plea, pleaded as follows:

“Save to admit that at the time of assault the Defendant acted within the course and scope of their employment and/or furthering the interest of the Defendant, the balance of the allegations in these paragraphs are denied.

The Defendant specifically pleads that the striking workers were alerted of the court order which ordered them to be 500 meters away from the premises of the Complainant.

The Defendant warned the workers of the action that will be taken against them and further gave a second warning to them that force will be employed against them to disperse such crowd since less forceful methods proved to be ineffective.

The Plaintiff was aware of the risk of assault and that he may sustain an injury by refusing to move away from the main gate of the Complainant”.

[11] Following on from the contents of paragraph 6 of the Plaintiffs’ particulars of claim, the Plaintiffs then proceeded, in paragraph 7 of the particulars of claim, to make the following averments:

“It is therefore against the aforesaid background, nor it is apparent from the above that, the Members of the South African Police Service have neglected and or failed in the execution of their duties and or responsibilities as Members of the South African Police Services to do the following;-

7.1 Firstly, establish in detail from the complaints (if any) what occurred between the complaints and the Plaintiff;

7.2 Secondly to do thorough and or proper investigation before assaulting and detaining the Plaintiff”.

[12] The Defendant, in paragraph 6 of his amended plea, pleaded to the above quoted contents of paragraph 7 of the Plaintiffs’ particulars of claim as follows:

“The contents of these paragraphs are denied, and the Defendant submits that the members did not neglect nor fail to investigate the said allegations prior to effecting the assault and detention of the Plaintiff.

The Defendant pleads that the members of the Police acted lawfully and that their actions were reasonable in the circumstances and justified by necessity”. (Court’s emphasis)

[13] In summary, and having regard to the contents of the pleadings before the Court it is evident that the Defendant admits the assault on the Plaintiffs but denies that the assault was unlawful and wrongful and proceeds to plead that the assault was lawful and that the actions

of the police officials were reasonable in the circumstances and were justified by necessity in order to achieve one, or both of the following: (a) to enforce an order of court as obtained by Botshelo Mills against the striking workers and further (b) to fulfil the duty resting on the police service and police officials to prevent and combat crime and to maintain public order. [1] For the purpose of adjudicating only the merits of this matter it is not necessary to deal with the remainder of the contents of the pleadings exchanged between the Plaintiffs and the Defendant.

- [14] It is of importance to note that that the Plaintiffs did not reply to the contents of the Defendant's amended plea as the Plaintiffs were entitled to do in terms of the provisions of Rule 28(8) of the Uniform Court Rules.

THE DEFENDANT'S DEFENCE AND THE ONUS OF PROOF

- [15] As is evident from the contents of paragraphs 3 to 6 of the Defendant's amended plea, the Defendant raised the defences that "...the assault was lawful and that the actions of the members [Defendant] were reasonable in the circumstances and were justified by necessity..." and "The Defendant again denies that the assault was unlawful and wrongful and specifically pleads that the assault was lawful and that the actions of the members were reasonable in the circumstances and justified by necessity". (Court's emphasis)
- [16] The Defendant also pleaded the facts and circumstances which underpinned the defence of necessity. These facts and circumstances are to be found in paragraphs 3 and 5 of the Defendant's amended plea and in summary comprise the following:
- [16.1] The assault was lawful and the actions of the of the police officials were reasonable under the circumstances and were justified by necessity;
- [16.2] Botshelo Mills (also referred to as "the Complainant" in the pleadings) obtained a court order which interdicted striking workers from coming within 500 meters of the main gate of Botshelo Mills, preventing non-striking workers from reporting for duty, blocking the entrance to Botshelo Mills's premises, and assaulting or threatening non-striking workers;
- [16.3] the striking workers were alerted of the court order which ordered them to be 500 meters away from the premises of Botshelo Mills;
- [16.4] despite the court order the workers refused to move away from the main gate entrance of Botshelo Mills;
- [16.5] the Defendant warned the workers that action will be taken against them and further gave a second warning to them that force will be employed against them to disperse such crowd since less forceful methods proved to be ineffective;
- [16.6] the Plaintiffs were aware of the risk of assault and that they may sustain an injury by refusing to move away from the main gate of Botshelo Mills; and

[16.7] furthermore and in general, the police have a duty to prevent and combat crime and to maintain public order.

[17] In Harms Amler's Precedents of Pleadings[2] it is stated regarding the defence of necessity, as raised by the Defendant in casu, that: "A person, acting out of necessity may lawfully inflict harm on another. The danger must exist or be imminent, and there must

be no reasonable means of averting having regard to all inflicting harm. The means and measures must not be excessive, having

regard to all the circumstances of the case. Whether a situation of necessity existed is a factual question which must be

determined objectively."

[18] As to the onus attracted by the above referred to defence, Harms[3] states that: "The onus lies on a defendant who admits the 'assault' to prove the lawfulness of the 'assault and arrest'...". (Court's emphasis)

[19] In Petersen v Minister of Safety and Security[4] the following is stated by the Supreme Court of Appeal regarding the defence of necessity:

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

(See also for example Crown Chicken (Pty) Ltd t/a Rocklands Poultry v Rieck 2007

(2) SA 118 (SCA) at paragraphs [13]-[14] [also reported at [2007] 1 BLLR 1 (SCA) - Ed]; D Visser "Delict" in F de Bois (ed); Willie's Principles of South African Law (9ed) (2007) at 1146;

Neethling, Potgieter & Visser Law of Delict (5ed) (2006) Chapter 3 at paragraph 6.3.)"

THE EVIDENCE BEFORE THE COURT:

- [20] Having dealt with the contents of the pleadings in this matter and having established that the onus of proof “...lies on a defendant who admits the ‘assault’ to prove the lawfulness of the ‘assault’...”, the Court must objectively determine the factual question of whether a situation of necessity existed in casu. This can only be done by having regard to the evidence which was presented by the respective parties and viewing same through the spectacles of the pleadings, as same framed the issues before the Court.
- [21] At the hearing of the matter, the Plaintiffs adduced the evidence of three witnesses, to wit the First Plaintiff, the Second Plaintiff and one Israel Modisaotsile Ntlame. The Third Plaintiff did not testify at the hearing of the matter.
- [22] One witness testified on behalf of the Defendant. This witness was Captain Jonas Manoto, the commander in charge of the Public Order Policing Unit on the day in question, i.e. 29 March 2016.

THE EVIDENCE OF THE FIRST PLAINTIFF

- [23] The First Plaintiff testified that on 29 March 2016 he was outside the gate of Botshelo Mills with other workers partaking in a labour strike when their union representative, one Mphatlhele, told them, subsequent to “talks” being conducted between the worker’s union, Botshelo Mills and the police that Botshelo Mills has applied for a court order against the striking workers and that the police will read the court order to them.
- [24] The police did not read the court order to them, but only said to them that the “...time is finished...” and then the police started shooting at them. At the time when the police started shooting at them they were seated and he testified that they were “surprised” when the police commenced to shoot at them. As a result of the shooting they sustained injuries.
- [25] During his testimony in chief the First Plaintiff made no mention of the fact that he was aware of the contents of the court, i.e. that the court order provided that the striking workers must be 500 meters from the Botshelo Mills main gate.
- [26] During the cross-examination of the First Plaintiff he was confronted with the contents of an affidavit which he attested to on 29 April
2016. In this affidavit the First Plaintiff plainly stated under oath that the union representative addressed them and told them that Botshelo Mills has obtained a court order which provide that the striking workers must be 500 meters away from the Botshelo Mills premises.
- [27] Upon being confronted with his earlier version, as set out in the affidavit, the First Plaintiff reiterated that they were told that the court order was “...applied for...” but the police were supposed to “show” them the court order and “read” it to them.

- [28] During cross-examination it then became evident that the Plaintiff was in fact made aware by Mphatlhele of the contents of the court order and he proceeded to refer to the position where they must stand at the “N14” road.
- [29] In cross examination the First Plaintiff was confronted with the fact that he was aware of what the contents of the court order was, i.e. that the striking workers must be 500 meters away from the Botshelo Mills premises. Upon being confronted with this fact the First Plaintiff testified that the striking workers were waiting to be “formally” informed as to what the contents of the court order were. The Court enquired from the First Plaintiff what he meant by stating that the workers were waiting to be “formally” informed. The First Respondent testified that they did not know
- if they should move away from where they were standing.
- [30] In evidence given by the First Plaintiff in redirect the First Plaintiff disavowed the contents of his affidavit by testifying that same was not in his handwriting and was never read back to him.
- [31] The affidavit attested to by the First Plaintiff and referred to in the cross examination of the First Plaintiff was duly discovered during the exchange of pleadings in this matter and was also referred to and utilised during the hearing of the matter by both parties. This affidavit is set out on pages 59 to 61 of the “Index – General Documents” bundle before the Court.
- [32] On 29 April 2016 the First Plaintiff attested to an affidavit for the purposes of laying criminal charges of assault against the members of the South African Police Service following on from the events which have transpired on 29 March 2016 and as referred to in paragraph 5 of the Plaintiffs’ particulars of claim. The contents of this affidavit are of importance and accordingly the Court quote the contents thereof in toto. The affidavit made by the First Plaintiff reads as follows:

“I declare that the contents of this statement are true to the best on my knowledge that if it were tendered in evidence I would be liable to prosecution if I have wilfully stated in it anything which I know to be false or which I do not believe to be true.

I am lawful owner of the above mentioned. Particulars state under oath that:

On Tuesday 2016-03-29 at about ± 16:30 our Union with Rep Mphatlhela held a meeting with Botshelo management inside the yard of Botshelo workers were waited outside the yard. I was also waited outside. The gate was closed & locked properly.

After a while our Rep went outside and told us that they have Court Interdict from Botshelo that say’s we must be 500 meters away from Botshelo premises. And they told us that the police will count that 500 meters for us and show us where must we stand on the following day for our next day meeting which was supposed to be held on 2016-03-30.

The union Rep then leave us after some few minutes members of Police arrived and told us that they have gave us time. They then started to use tear-gas on us. I was sitting on the ground. I then hear Gun Shot. We then try to flee and I was feeling dizzy and run for some few meters I then fell pain on my left leg. I then lift up my trouser and saw open wounds on my leg. I then stop running and went home.

The wounds on my left leg it was cause by rubber bullets that was fire by police official that where on the scene.

I did not give anyone permission to shot me as I suspect police official that were on the scene by that time.

I request police investigation on this.” (Court’s emphasis)

THE EVIDENCE OF THE SECOND PLAINTIFF

[33] The Second Plaintiff testified that he was present at the labour strike action when the police just commence shooting at the striking workers.

[34] The union representative, Mphatlhele told the striking workers that Botshelo Mills are going to apply for a court order and thereafter he left. According to the Second Plaintiff the court order “...came after...” the striking workers were shot at by the police.

[35] It is the version of the Second Plaintiff that no information regarding the contents of the court order was conveyed to the striking workers by Mphatlhele. The Second Plaintiff testified that no one made the striking workers aware of the court order.

[36] In cross-examination the Second Plaintiff testified that the striking workers only became aware of the court order a week after the police shot at them when a shop steward informed them of the court order.

[37] He testified that no one told them to stay 500 meters away from the Botshelo Mills premises. He also testified that the union representative Mphatlhele left for Johannesburg after the meeting between Botshelo Mills and the union representatives.

[38] In cross-examination the Second Plaintiff was also referred to the contents of an affidavit which he attested to on 29 April 2016. As with the First Plaintiff the Second Plaintiff also on 29 April 2016 attested to an affidavit for the purposes of laying criminal charges of assault against the members of the South African Police Service. The affidavit made by the Second Plaintiff reads as follows:

On Tuesday 2016-03-29 at around 17:00 I was in front of the main gate of where I work which is Botshelo Mills and we had a legal gathering in front of the premises and there were no illegal activities happening and there were police officials who were at the gathering.

While we were standing in front of the entrance a certain police official who I know as Mr. Manoto suddenly ordered the other police officials to shoot at us, and that is when an active teargas canister was thrown at us, and I run forward & indirection of the tap, when I finished washing my face I turned back only to find Mr. Manoto pointing at me with a firearm and he immediately shot me on my left knee and I fell down. I stood up and tried to flee and he shot me again on my left arm and I run away.

I gave no one permission to shoot at me and I am going to require further police investigation into this matter.

That is all I can declare for now”.

THE EVIDENCE OF THE ISRAEL MODISAOTSILE NTLAME

[39] Mr Ntlame testified that on the day in question, 29 March 2016 he was present at the gate of Botshelo Mills and that Mphatlhele addressed the striking workers by saying that there is a “letter” and when it is “ready” the “letter will be read to the striking workers.

[40] On the day in question the union representative told them that the “letter” was not “ready”. The union representative then left. The “letter” instructing the striking workers to remain 500 meters away from the Botshelo Mills premises were only read “after” the police shot at the striking workers.

[41] The police did not read this “letter” to the striking workers. The police officials were in a meeting at Botshelo Mills where after they came out and commence to put their uniforms on and said that “time is finished”. He testified that the police officials came from “behind” them when they were shot at. This happened while they were seated.

[42] During his cross-examination Mr Ntlame confirmed that there were approximately 215 striking workers in front of the gate of the Botshelo Mills premises on the day in question. The “letter” was only read approximately 4 days to a week after the shooting incident took place. He does not know what the police officials meant when they said that “time is finished” as per his testimony in chief.

THE EVIDENCE OF CAPTAIN MONOTO

[43] As stated above Captain Monoto testified on behalf of the Defendant. Captain Monoto testified that he is a police official for the past 29 years and that he was the commander of the Public Order Policing Unit of the SAPS present at Botshelo Mills on the day of the incident, i.e. 29 March 2016.

- [44] Upon his arrival at the scene he attended a meeting between the representatives of Botshelo Mills and the “leaders” of the worker’s union. There were approximately 400 striking workers in front of the gate of the Botshelo Mills premises singing freedom songs. Initially there was conflict in the meeting between the representatives of Botshelo Mills and the worker’s union but he advised them to lay aside their differences and try to reach an agreement.
- [45] During the meeting the representatives of Botshelo Mills produced the court order which ordered the striking workers to keep a distance of 500 meters from the gate of Botshelo Mills and Captain Monoto advised the worker’s union representatives that the striking workers must obey the court order. He told the worker’s union representatives that they must go and inform the striking workers outside of the court order.
- [46] Captain Monoto then established a position which he estimated to be a distance of approximately 500 meters away from the gate of Botshelo Mills. He pointed this position out to the worker’s union representatives and instructed them that the workers must retreat to this position in order to comply with the court order. This position was to the “left-hand side” of the gate. This was done while Captain Monoto and the worker’s union representatives were in front of the gate of Botshelo Mills. He also told the worker’s union representatives that if the workers do not retreat the police will have to remove them.
- [47] Captain Monoto testified that he also informed the workers standing at the gate that he will remove them. When it was time for other workers of Botshelo Mills who did not partake in the strike to leave through the gate the striking workers were still in front of the gate and did not retreat 500 meters.
- [48] At that time Captain Monoto ordered the use of a stun grenade and teargas. Arrests of striking workers were also made by the police at that stage. The striking workers moved away from the gate but did not retreat 500 meters from the gate.
- [49] The situation then escalated as striking workers closed the “Vryburg Road” and tyres were set alight on the said road. Some of the striking workers then jumped over a “fence” and set “trucks” of Botshelo Mills alight. Employees of Botshelo Mills who were not taking part in the strike were still at the premises of Botshelo Mills and he was concerned for their safety and he advised them accordingly.
- [50] The police officials only commence to fire rubber bullets 5 to 6 minutes after they have thrown the stun grenade and tear gas and at the time when the police and passing motorists were “pelted” with stones by the striking workers.

- [51] During cross-examination Captain Monoto confirmed that he did not read the contents of the court order to the striking workers. He read the contents of the court order to the striking workers' union representatives and he informed them to convey the contents of the court order to the striking workers. He confirmed that two union representatives left the meeting where the contents of the court order was read to the workers' union representatives to went to talk to the striking workers for this purpose.
- [52] Captain Monoto also confirmed during cross-examination that he instructed the striking workers present at the gate of Botshelo Mills to move away from the gate to the position on the "left-hand side", where he established approximately 500 meters to be located at. He did this by shouting these instructions at the workers in front of the gate.

THE EVALUATION OF THE EVIDENCE AGAINST THE REQUIREMENTS OF THE DEFENDANT'S DEFENCE

- [53] The Defendant's defence of necessity means that: "What would otherwise have been an unlawful act is rendered lawful because of the prevailing circumstances." [5]
- [54] It was already stated above that whether a "situation of necessity" existed is a factual question which must be determined objectively. Regarding the above referred to criteria, LAWSA [6] states that "The objective criterion is interpreted as meaning that there must have been reasonable grounds for believing that a situation of actual or imminent danger existed. The actor's subjective belief that a state of necessity existed is not the determining factor. 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. The nature of the threat, the extent of harm, the likelihood of serious injury to persons, and the value of the interest threatened must, for example, be taken into consideration. It must have been the only reasonable possible means of averting the danger. Similarly, although any interest may be protected, the interest infringed or the harm inflicted should not be greater than the interest protected or the harm prevented." (Court's emphasis)
- [55] In order for the Defendant to succeed with his defence of necessity the Defendant must satisfy the requirements as confirmed by the Supreme Court of Appeal in the matter of *Maimela and Another v Makhado Municipality and Another* [7] wherein it was stated with reference to Burchell's Principles of Delict, that "...for an act to be justified on the ground of necessity the following requirements must be satisfied: (a) a legal interest of the defendant must have been endangered, (b) by a threat which had commenced or was imminent but which was
- (c) not caused by the defendant's fault, and, in addition, it must have been (d) necessary for the defendant to avert the danger, and (e) the means used for this purpose must have been reasonable in the circumstances."

- [56] LAWSA[8] also states regarding the defence of necessity that: “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 (including the innocent person) against a dangerous situation. The dangerous situation may be the result of the wrongful conduct of another...” (Court’s emphasis)
- [57] The question in casu is did the Defendant prove the lawfulness of the actions of the police officials on 29 March 2016 by establishing the above referred to requirements of the defence of necessity? In order to answer this question the Court must analyse the evidence before the Court.
- [58] It is common cause that on the day in question there was a court order in existence interdicting the striking workers from not being closer than 500 meters of the gate of Botshelo Mills. It was also not disputed that the police service and officials have a duty to prevent and combat crime and to maintain public order.
- [59] The Defendant carries the burden of proof to establish the defence raised and as such the Court will firstly deal with the evidence of Captain Monoto. It was not disputed during the cross-examination of Captain Monoto that he expressly informed the worker’s union representative of the fact that Botshelo Mills obtained the aforementioned court order and its contents. Captain Monoto instructed the worker’s union representative to inform their members accordingly and he pointed out the position to where the striking workers must retreat. The latter act was executed at the gate of the premises.
- [60] He also testified that he informed the striking workers who was present at the gate that they must retreat to a position at the “left-hand side” of the gate which he estimated was about 500 meters away from the gate. He did so by shouting this instruction to them. He readily conceded that he did not read the contents of the court order to the striking workers because he conveyed it to their union representatives, who there and then represented them as their leaders in the strike action. He testified that he instructed the union representatives to inform their members of the contents of the court order.
- [61] If one has regard to the version of the Plaintiffs that the police officials merely started shooting at them whilst they were “seated” at the gate, a pivotal aspect of Captain Monoto’s evidence was, peculiarly so, not disputed during cross-examination. This was the sequence of the actions taken by the police officials when the striking workers failed to move away from the gate and the fact that the police officials only fired rubber bullets (which according to the evidence of the Plaintiffs cause their injuries) once the strike action spiralled into lawlessness.

- [62] In this regard he testified that initially a stun grenade and teargas were utilised to move the striking workers away from the gate. The striking workers then closed the Vryburg Road and set tyres and vehicles alight. When the striking workers commenced to attack motorists and police officials with stones, only then did the police officials resort to the firing of rubber bullets at the striking workers.
- [63] As a witness Captain Monoto made a favourable impression upon the Court and his evidence in chief and in cross-examination was not contradictory. His version of events on that day was also, in the view of the Court, the probable version of the events which have transpired and the sequence in which they occurred.
- [64] Turning to the evidence adduced on behalf of the Plaintiffs. In his evidence in chief the First Plaintiff steered clear of alluding to the fact that the contents of the court order were conveyed to the workers by Mphatlhele. This version does not accord with the contents of his earlier affidavit and his testimony during cross-examination.
- [65] Approximately a month after the shooting incident took place the First Plaintiff declared under oath in a written statement that: "After a while our Rep went outside and told us that they have Court Interdict from Botshelo that say's we must be 500 meters away from Botshelo premises." This version stated by the First Plaintiff in his sworn affidavit and approximately one month after the incident is aligned with the version of Captain Monoto and in the view of the Court confirms that the contents of the court order was in fact conveyed by the worker's union representative to the striking workers. Notwithstanding the First Plaintiff's attempt to disavow the contents of his affidavit in redirect evidence, the pertinent question remains: where did the contents of the affidavit emanated from, if not from the First Plaintiff?
- [66] As alluded to in the preceding paragraph, the contents of the affidavit attested to by the First Plaintiff is contrary to his testimony in chief. In chief, the First Plaintiff testified that Mphatlhele told the striking workers that Botshelo Mills has applied for a court order against them and that the police will read the court order to them. The police did not do so, but only said to them that the "...time is finished..." and then summarily started shooting at them.
- [67] It is in the view of the Court highly improbable that the police will merely commence shooting at the striking workers whilst they are seated at the gate of Botshelo Mills, as the Plaintiffs would have it. The version of Captain Monoto on this aspect is more probable and in the view of the Court, the credible one. This is the case in as far as Captain Monoto's evidence on this aspect is also contrary to that of the Second Plaintiff and Mr Ntlame.

[68] Moreover, and as stated above, Captain Monoto's evidence as to when the police officials were compelled to commence with the firing of rubber bullets was not disputed during his cross-examination. This, in the view of the Court, is a turning point in this matter, especially if one has regard to the defence of necessity raised by the Defendant and the fact that the Defendant pleaded that the actions of the police officials were necessitated in order to also "...prevent and combat crime and to maintain public order...".

[69] In cross-examination the First Plaintiff amended the evidence he gave in his examination in chief and it became evident that Mphatlhele did relay the contents of the court order to the striking workers. This accords with the First Plaintiff's earlier affidavit. The First Plaintiff endeavoured to explain the discord between his evidence in chief and that of the contents of the affidavit and his evidence in cross-examination by stating that the striking workers were waiting to be "formally" informed as to what the contents of the court order were. The First Plaintiff adjusted

his evidence in this regard and it is the view of the Court that the credibility of the First Plaintiff's evidence must be called into question.

[70] The evidence of the Second Plaintiff largely suffers the same fate. In fact, the evidence of the First Plaintiff and that of the Second Plaintiff does not even align. The First Plaintiff testified that Mphatlhele told the workers that that Botshelo Mills has applied for a court order against them and that the police will read the court order to them. The Second Plaintiff testified that Mphatlhele told the striking workers that Botshelo Mills are going to apply for a court order and thereafter he left. The Second Respondent testified that he only became aware of the court order a week after the police shot at them when a shop steward informed them of the order. As stated above, the First Plaintiff declared

under oath in his affidavit dated 29 April 2016 that the union representative conveyed the contents of the court order to the workers when came out of the meeting on 29 March 2016.

[71] It is also the version of the Second Plaintiff that the police suddenly and without any warning started shooting at the striking workers. The Court has already stated that this turn of events seems highly improbable and that the version of Captain Monoto on this aspect, should be accepted.

[72] Mr Ntlame evidence provides a third version to that of the First Plaintiff and the Second Plaintiff in as far as the issue of the knowledge of the court order is concerned. He testified that Mphatlhele addressed the striking workers by saying that there is a "letter" and when it is "ready" the "letter will be read to the striking workers. This "letter" was only read "after" the police shot at the striking workers. His version also amounts to the police officials summarily firing rubber bullets at the striking workers without any warning.

- [73] Turning to the pleadings in this matter it evident that the Defendant established by means of the evidence of Captain Monoto, which the Court accepts as probable and credible, the facts set out in the amended plea and as quoted earlier in this judgement. In this regard the Court refers to inter alia the contents of paragraphs 13 and 16 supra.
- [74] However, and in the view of the Court, the matter simply does not solely pivot around the existence and/or knowledge of the court order by the striking workers. The pleadings are clear in this regard and evidence was led to this effect. Paragraph 3(5) of the Defendant's amended plea goes further than the mere issue of the court order obtained by Botshelo Mills, the enforcement thereof and the interest of Botshelo Mills as represented by the contents thereof. The matter also involves the general duty of the police to maintain law and order and to prevent lawlessness and crime. It was not disputed that the strike action escalated to lawlessness and crime by means of striking workers closing a public road, setting tyres and vehicles alight and pelting motorists and the police officials with stones. These actions then prompted the firing of rubber bullets.
- [75] In Paragraph 3(5) of the Defendant's amended plea, the Defendant expressly referred to the duty resting on the police to combat such lawless behaviour. This paragraph states that: "The Defendant further states that the Police has a duty to prevent and combat crime and to maintain public order and may use minimum force which is reasonable in the circumstances." This paragraph must be read with the contents of paragraph 4(2) of the amended plea, as quoted above.
- [76] The Defendant's amended plea clearly sets out that the actions of the police officials on the day in question were reasonable in the circumstances and were justified by necessity in order to achieve not only the enforcement of the order of court, but also to fulfil the duty resting on the police service and police officials to prevent and combat crime and to maintain public order.[9] Having regard to this fact, the mere question as to whether the Plaintiffs knew about the contents of the court order is not the only relevant issue in this matter. In addition, the Defendant pleaded that the actions of the police officials were necessitated in order to fulfil the duty resting on the police service and police officials to prevent and combat crime and to maintain public order.
- [77] The police officials only commenced to shoot rubber bullets once the striking workers commenced to set vehicles alight and pelted motorists and the police officials with stones. In doing so the police officials protected the lawful interest of other citizens, acted against crimes being committed and endeavoured to maintain public order. For the purpose of the Defendant's defence to succeed it is irrelevant of whether the Plaintiffs partook in the aforementioned illegal activities or not.[10] The fact remains that the police officials acted by necessity in protecting the assets of Botshelo Mills and the life and limb of motorists and police officials on the day in question. The Court again reiterates that this aspect of Captain Monoto's

evidence were not disputed by the Plaintiffs and thus stands uncontested.

[78] The circumstance under which the police commenced to shoot with rubber bullets and the chronology of the different actions taken by the police officials to safeguard persons and assets, as testified to by Captain Monoto also confirms that the situation, objectively adjudicated, represented one of actual and imminent danger. The means used and measures taken to avert the danger of harm, again having regard to the sequence of events and the measures taken by the police officials at each stage of the vents which has unfolded, were not excessive.

[79] The actions taken by the police officials under the above referred to circumstances were, in the view of the Court and for the

reasons

set out above, justified by necessity. The Defendant has lifted the burden of proof to establish the defence raised by the

Defendant. In so doing the Defendant is the successful party in these proceedings.

[80] This brings one to the final issue of costs. Cilliers The Law of Costs[11]states: “It has been held on a number of occasions that the court’s wide discretion in this regard is not an unlimited discretion. In *Levben Products (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd* 1957 (4) SA 225 (SR) at 227 Murray CJ held that the fundamental principle underlying an award of costs is twofold. In the first place the award of costs is a matter in which the trial judge is given a discretion. This discretion must be exercised upon grounds on which a reasonable person could have come to the conclusion arrived at. The learned judge proceeded to hold that, second, there is the general rule that costs should be awarded to the successful party, a rule which should not be departed from without good grounds. In *Graphic Laminates CC v Albar Distributors CC* 2005 (5) SA 409 (C) at 412 Van Reenen J gave the following exposition of some of the most important rules relating to awards of costs: ‘It is trite that liability for costs in civil proceedings is a separate issue that is governed by its own criteria. The fundamental principle is that liability for costs is in the discretion of the court that is called upon to adjudicate the merits

of the issues between the parties. (see *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69) on the basis of the facts and circumstances of each individual case (see *Cronje v Pelser* 1967 (2) SA 589 (A) at 593). In the absence of express statutory provisions to the contrary, the general rule that costs follow the result is subservient to that fundamental principle (see eg *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 2003 (1) SA 204 (T) at 215E-F.” (Court’s emphasis and footnotes omitted)

[81] The three matters before the Court represents actions for damages founded in delict launched by the Plaintiffs against the Defendant and no more. There were no Constitutional issues raised, nor decided. The pleadings,

again, are clear on this issue. As such, the principles enunciated in the Trustees Boiwatch Trust v Registrar: Generic Resources and Others^[12] do not find application. In the view of the Court the “general rule” as referred to by Cilliers must find application and the Court finds no “good grounds” to depart therefrom.

[82] Accordingly, this Court make an order in the following terms:

1. The First Plaintiff’s claim under case number 1405/2016, the Second Plaintiff’s claim under case number 1403/2016 and the Third Plaintiff’s claim under case number 1404/2016 are dismissed.
2. The Plaintiffs in each of the respective cases are ordered to pay the costs of the Defendant on a scale as between party and party.

N G LAUBSCHER

ACTING JUDGE OF THE HIGH COURT,

APPEARANCES

DATE OF HEARING

: 10 September 2019

DATE OF JUDGMENT

: 28 November 2019

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COUNSEL FOR DEFENDANT : Adv Z Williams

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[1] See paragraph 3 of the Defendant’s amended plea as quoted above.

[2] LexisNexis 9th edition at p 58 and also note the Supreme Court of Appeal and Constitutional Court authorities referred to by the author on the same page.

[3] Supra at p 58.

[4]

[2010] 1 All SA 19 (SCA) at paragraph 11.

[5] LAWSA (Volume 15 - Third Edition) at paragraph 112.

[6] (Volume 15 - Third Edition) at paragraph 112.

[7] 2011 (6) SA 533 (SCA) at paragraph 17.

[8] Supra at paragraph 112.

[9] See paragraph 3 of the Defendant's amended plea as quoted above.

[10] See Petersen v Minister of Safety and Security supra at paragraph 11, as quoted above.

[11] The Law of Costs, LexisNexis, paragraph 2.03.

[12] 2005

(4) SA 111 (T).

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