

SOUTH AFRICA / JUDGMENT

Umbhaba Estates (Pty) Ltd and Others v Minister of Police and Others (22208/2009) [2021] ZAGPPHC 436 (20 May 2021)

[2021] ZAGPPHC 436

COURT

North Gauteng High Court, Pretoria

BEFORE

Mtati

CASE / FILE NUMBER

22208/2009

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

No: 22208/2009

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

NOT

REVISED

Date:

20 May 2021

In

the matter between:

UMBHABA
ESTATES (PTY) LTD AND
PLAINTIFF
FIFTY
THREE OTHERS
and
MINISTER
OF POLICE
1ST DEFENDANT
NATIONAL
COMMISSIONER OF THE SAPS
2ND DEFENDANT
PROVINCIAL
COMISSIONER OF THE SAPS
3RD DEFENDANT

Coram: Mtati

AJ

Delivered: 20

May 2021 - This judgment was handed down electronically by
circulation to the parties' representatives by email, by being
uploaded

to the CaseLines system of the GPO and by release to SAFLII.

The date and time for hand-down is deemed to be 10:00 on 20 May 2021.

Summary: Duty

of care - failure by the police to respond to request to restrain
protracted strike resulting in damage to property- responsibility
of

the police to act positively in preventing crime - legal convictions
of the community to expect police to act- failure to do
so results in
wrongful and negligent conduct.

Procedure:

Postponement - withdrawal as attorney of record - no mandate to seek
postponement - interests of justice to be considered
in deciding the
application - to be weighed with the intention to reach finality on
proceedings

JUDGMENT

MTATI AJ

Introduction

- [1] This matter recounts a number of incidents that relate to the responsibility of police officers in instances of a strike by employees of a private company. Specifically, the issue for determination is the liability of the police on whether their conduct was wrongful and negligent resulting, in principle, damage which could have been circumvented had the police taken appropriate action well in advance.
- [2] The merits and quantum have by agreement between the parties been separated in terms of Uniform Rule 33 (4) and the Court has so ordered and accordingly, this matter proceeded only on the issue of liability. At the commencement of the proceedings it became apparent that some of the Plaintiffs are no longer pursuing their claims against the Defendants and further that Counsel for the Plaintiffs and the Plaintiffs representatives no longer have a mandate to proceed on behalf of other Plaintiffs. This turn of events necessitated a request by the Court that the parties agree and formulate a written framework describing all the Plaintiffs who are proceeding with this litigation, those whose matters are withdrawn and those where Counsel withdraws as an attorney of record. The written formulation agreed to by the parties was handed in as exhibit 1 titled "Proposed Formulation".
- [3] In summary the formulation by the parties resulted in the matter being proceeded with in respect of the claims of the 1st and the 6th Plaintiff. The claims of the following Plaintiffs were withdrawn: 2 to 5, 13, 20, 23, 37, 41, 44 and 52. The Plaintiffs' attorneys have withdrawn as attorneys of record due to lack of instructions in respect of the following Plaintiffs: 7 to 12, 14 to 19, 21, 22, 24 to 36, 38 to 40, 42 and 43, 45 to 51 and 53.
- [4] Mr Labuschagne for the Plaintiffs requested the Court that the claims in respect of all the Plaintiffs where the attorney has withdrawn for lack of instructions should be postponed sine die since they did not know of the date of trial and further that it shall be in the interests of justice to do so. Mr Phaswane for the Defendants opposed this proposition and argued that the attorneys had no mandate to make such an application. I shall revert to this application later in this

judgment.

- [5] The issues that are separated and not forming part of this judgment are therefore the following:

- 5.1. Whether the plaintiffs suffered damage under the heads of damages as pleaded;
- 5.2. The extent to which such damage is causally linked to the wrongful conduct; and
- 5.3. The quantum of such damages.

[6] The tenet of the Plaintiffs' claim is based on the duty of care on the part of the Defendants to protect them and their property from unlawful behaviour of the striking workers as contained in various

provisions of our Constitution.

The parties

[7] The First Plaintiff is Umbhaba Estates (Pty) Ltd (Umbhaba), a company incorporated in terms of the Companies Act of South Africa, No. 61 of 1973 with its registered office situated at Umbhaba Estates, R40 road, Hazyview, Mpumalanga.

[8] The Second to the Fifty Third Plaintiffs are constituted of directors, managers, security officers, electricians and general farm workers all employed or forming part of the First Plaintiff. I do not intend stating each one of them except the 5th Plaintiff who is Ms Alida Mkhabela, an adult farm worker, employed by Umbhaba.

[9] The First Defendant is The Minister of Safety and Security, the responsible Minister of the South African Police Services, as set out in section 1 of the South African Police Services Act, 68 of 1995 hereinafter referred to as the Minister.

[10] The Second Defendant is The National Commissioner of the South African Police Services.

[11] The Third Defendant is the Provincial Commissioner of the South African Police Services, Mpumalanga hereinafter referred to as the Provincial Commissioner.

The background facts

[12] It is common cause that the First Plaintiff is a large agricultural enterprise operating out of three geographical locations in Mpumalanga. Their core business is growing, ripening, distribution and selling mainly bananas to customers throughout South Africa. They also produce avocados, litchis and macadamia nuts.

[13] On the 5th of July 2007 and for the remainder of the month of July there was a prolonged strike in one of their operations. The strike was focussed on their Kiepersol farm situated in Hazyview, Mpumalanga. The strike was characterised by violence through various acts of intimidation, assaults, malicious damage to property, vandalism, theft, road blockades and various acts of looting.

[14] According to the evidence, the South African Police Services (SAPS) were informed of the looming strike before it commenced on the 5th of July

2007. Importantly, the SAPS were informed of suspicions that there is a great likelihood that the strike is likely to be violent. I shall deal hereunder with the testimony of the two witnesses called on behalf of the First and the Sixth Plaintiffs testifying on specific incidents that took place during the strike. It is the Plaintiffs case that there were no reasonable steps taken by the SAPS to safeguard non-striking workers and property. This is disputed by the

Defendants.

[15] It appears that the Kiepersol farm had been bought by the First Plaintiff approximately six months before the strike. The First Plaintiff assumed the services of about one hundred employees who worked for the erstwhile owner of the Kiepersol farm. The reason for the strike was seemingly as a result of a new requirement by the First Plaintiff that these workers were also to also work on Saturdays when they were not accustomed to work Saturdays with their former employer.

The evidence

[16] Mr Dean Ernest Plath (Mr Dean) testified that he is a senior farm manager and a director at Umbhaba. The Umbhaba agricultural business was started by his father and he has been formally working on the business for some approximately 22 years. The Umbhaba business operates in three farms one of which is the Kiepersol farm where the strike took place.

[17] Umbhaba employs between 1500 to 2500 employees depending on the season. The nature of the business is labour intensive. Mr Dean proceeded to describe the three farm operations and handed in a number of videos as exhibits as well as photos. I will not deal with all the exhibits in this judgment save where specifically required to do so. The main event surrounding the strike and the alleged acts of unlawful conduct took place at Kiepersol farm.

[18] The aerial photograph of the Kiepersol farm was handed in and marked exhibit 4. Kiepersol farm consists of the main gate situated on the western side of the farm. Approximately 40 metres or so towards east there is another gate referred to as the south yard gate. The south yard gate provides access to the main farming operations including the administration building where morning meetings and trainings are held. There is also a big building which is used by farm workers to package the farm produce. There are also toilets outside to what I refer to as the main building as it appears to be the largest building that is used by staff. Around the buildings and mostly on the northern side there is farm equipment. These buildings are cordoned off by a wall. The Court also observed that there is another gate within the cordoned structure which is on the extreme south east of the cordoned wall referred to as the main yard gate.

[19] Behind the cordoned buildings (main farm operations) on the eastern side there are a number of smaller structures which were confirmed by Mr Dean to be houses accommodating some of the workers. His testimony was that these houses were occupied by both striking and non-striking workers. I pause to mention that the houses referred to above are within Kiepersol farm. On the southern side of the main farm operations the Court observed banana plantations with a gravel path between the wall and the banana plantations. Access to the houses referred to above on the eastern side of the buildings can be obtained through the main yard gate alternatively, through a gravel path between the southern wall and the banana plantation. In other words one does not necessarily need to enter the south yard gate in order to access the houses.

- [20] On 29 June 2007 Mr Dean received a notice of the intended strike which was to commence on 5 July 2007. After receipt thereof he proceeded to inform the Hazyview Police Station. This is because when they took occupation of the farm after buying same they faced some resistance from some of the employees of the erstwhile owner. Their farming operations commence from between 6h30 to 7h00 on a daily basis except on Sundays when the staff is off-duty.
- [21] On 5 July 2007 when they arrived at work for their normal early meetings they were met with some resistance from the striking workers who blockaded the main gate. They were hurling stones into the building of the main operations. Some of the striking workers were wielding sticks screaming and intimidating the non-striking workers. They were beating them and rounding them up to prevent them from entering the premises. One of their company vehicles was knocked with knobkerries as it was entering their premises.
- [22] Mr Dean and other managers decided to open and keep a diary of the chronology of events including telephone records of all calls made to police officials including the station commissioner and other senior officials. This chronology was timeously discovered and referred to throughout the evidence of Mr Dean. No objection was raised to the calls made nor an objection to the accuracy of the numbers. Neither was there any objection raised to the accuracy of the names of officials as rightful owners/possessors of those numbers.
- [23] They locked the gates to prevent the striking workers from entering the buildings. All this happened between 6h30 and 6h35. He personally called the police on his issued mobile phone and through use of the landline. He informed the police of these incidents of assault, intimidation and damage to property. The police who are stationed about 15 km away did not immediately come to their rescue. It was only at about 7h30 when two junior police officers arrived. The police approached them and informed them that the union officials wanted to talk to Mr Dean and his father.
- [24] Mr Dean and his father approached the gate and bemoaned the level of violence that was taking place. Mr Dean testified that he was himself almost hit with a brick. The Court observed through the video footage the two union officials in the presence of the police talking to the witness and another person supposedly the father of Mr Dean. Disturbingly, there is one person in the video footage who violently attempted to grab the camera that was taking the video footage. This happened in full view of the police although in his testimony, Captain Makwakwa, whose evidence I shall deal with later, denied seeing the episode.
- [25] An observation made by Mr Dean was that on arrival of the police there appeared to be calmness by the striking workers as they regrouped elsewhere on the street. They appeared to respect the presence of the police. The police on the other hand seemed to take the matter very casually and left soon after the discussions with the union representatives. According to Mr Dean the acts of criminality continued throughout the day. Some of the First Plaintiff's employees who were employed as electricians were also threatened with murder if they continued to work. There was no compliance with picketing rules by the

strikers.

- [26] According to Mr Dean there were about 50 instigators in the strike but the strikers were in the region of about 300. The police on the other hand estimated the number of strikers to about 50. In my view nothing turns on this.
- [27] The following day, the 5th of July 2007, was marked with a reduced members of staff who were prepared to work as a result of the continuous intimidations. A security guard, Mr Monyai, was also assaulted from within the farm. A video footage was played for the Court depicting injuries on the right eye, right shoulder and some abrasions on the back of Mr Monyai. According to Mr Dean a criminal case was opened for this incident and he was not certain if the matter was investigated further.
- [28] The strikers were continuing with their unlawful conduct of hurling stones and barricading the gates or at least some of them. At some stage Mr Dean's father fired some warning shots to thwart the constant attacks by the strikers. Mr Dean called the police again and on several occasions as demonstrated by his itemised billing showing the number of calls made. He spoke to the Station Commissioner by the name of Superintendent Nobela. Later Captain Mbambo, who had also been constantly called, arrived on the scene. Captain Mbambo encouraged the witness (Mr Dean) and management to talk to the striking workers since the incidents were labour related matters and that they, the police, do not have capacity. Management decided to employ the services of armed security guards as they were approaching the weekend and were concerned about security of Managers and their families.
- [29] As indicated above the reason for the strike was because the striking workers did not want to work on Saturdays. As such there were no striking activities during Saturdays and Sundays throughout the month of July. The 5th of July 2007 was on a Friday . It was only on Monday the 9th July 2007 that the activities of the strike resumed. According to the witness, Captain Mbambo was called on his mobile number on three occasions informing him that the strikers are back and blockading the gates and burning fires on some of the gates.
- [30] It is on 9 July 2007 that Mr Dean and management decided to approach the Labour Court for an interdict against the union, one union official and the striking workers who were all cited as the 1st to the 3rd Respondents. The order was granted on the same day. An excerpt of the order fully dealt with in paragraph 2 thereof provide that:
- "2.1. The 1st, 2nd and 3rd Respondents are interdicted from picketing at the main entrance of the Kiepersol Farm and compelled to picket a distance of 500 meters in a northerly direction (away from the R40 towards Kiepersol) from the main entrance of the Kiepersol Farm on the opposite side of the road.
- 2.2. The 1st, 2nd and 3rd Respondents are interdicted from entering the Kiepersol Farm during working hours except for purposes of using

allocated toilet facilities.

2.3. The residing employees leaving their living area in the morning and returning in the evening may only do so through the main entrance gate. The employees must pass the southern side of the walled yard area using only the farm road between the yard and the banana orchard ..."

[31] The order referred to above was handed over to Captain Mbambo who was in the company of Captain Khoza who explained the order to the striking workers. However and notwithstanding the explanation of the order there was again burning of fire obstructing entrance to the farm in the late afternoon according to the witness. On one of these acts of violence when the striking workers were hurling stones, the witness was in the presence of Captain Mbambo and Captain Khoza. It was only after stones were also hurled at the police that the first arrests took place according to Mr Dean. Captain Mbambo summoned for police back-up and this led to the arrest of four of the suspects.

[32] It is clear that the striking workers were not heeding to the court order and it is for that reason according to Mr Dean that on 10 July 2007, a day after the initial order, they went back to court to obtain a contempt of court order. A rule nisi was granted against the Respondents to show cause why they should not be found in contempt of court. The relevant excerpt of that order in these proceedings is contained in paragraphs 2 and 3 which read as follows:

"2. Member of the South African Police are hereby authorised to arrest such of the individual Respondents who breach the order of court of gth July 2007 and to bring such arrested individuals before the Magistrates Court in the area of jurisdiction of Nelspruit in order to enable the public prosecutor to decide on the charges of criminal conduct to be preferred against such individuals .

3. In particular members of the South African Police are authorized to arrest such of the individual Respondents who continue to intimidate the employees of the Applicant and/or who continue to damage the property of the Applicant ..."

[33] A meeting was held in the morning of 11 July 2007 around 9h30 constituted by the witness, Superintendent Nobela (station commissioner) as well as Captain Mbambo. The purpose thereof was to explain the order obtained by the witness together with additional and specific responsibilities imposed upon the police.

[34] The police did not enforce the order according to the witness since at about 11h00 on the 11th of July 2007 the strikers were still not at their dedicated and agreed picketing spot. There was still smouldering fire next to the main gate. On the same day at about 16h00 a petrol bomb was thrown into the yard leading to a burning of a tractor. Approximately four hundred kilograms of fruit was picked up along the road which was looted from inside the farm.

[35] The uncontroverted evidence of Mr Dean is that the violent acts of intimidation and damage to property continued after the second court order of contempt. The acts of violence escalated to throwing of petrol bombs into the property causing further damage to property. A number of criminal cases were opened each time there was evidence of wrong-doing. On 13 July 2007 the First Plaintiff approached the court for the third time on an urgent basis seeking an intervention from the police and in this instance the court ordered as follows:

"1. A copy of the order of this Court dated 10 July 2007 is to be served on the Commissioner of Police, Mpumalanga as well as on the National Commissioner, South African Police Services.

2. Mr Stanley Thulane Nobena, the Chairman of the 1st Respondent BBBWU who is in attendance at Court when this order [is] issued is hereby directed to inform the individual Respondents to desist from all criminal and wrongful conduct ..."

[36] Mr Maritz, who was leading Mr Dean, was thorough in linking every unlawful act to the calls made to individual police officials and as reflected in the itemised billing. These incidents were also cross-referenced to their diary containing chronology of events as well as police dockets where some were opened.

[37] After a number of letters were sent to the police officials in Hazyview requesting assistance and specifically to the office of the Provincial Commissioner together with the Minister of Police it appears as though it was on the 17th July 2007 that any substantial intervention took place. On this day according to Mr Dean there were a number of police officers in police vehicles. The striking workers were moved to a place further from the main entrance to what appeared to be in line with the prescribed location in accordance with the court order.

[38] The evidence indicates that whilst there had still been some level of non-compliance with the court orders after the 17th July 2007 the level of violence had lessened until on 24 July 2007 when the Sixth Plaintiff got injured through a stab wound according to Mr Dean.

[39] On 20 July 2007 after a disciplinary hearing was held 251 striking workers were dismissed.

[40] A video footage of 24 July 2007 was played in Court where a group of people appear to be storming the farm operations area inside a building where workers appear to be packing some fruit. There was a huge commotion which resulted in injury to the Sixth Plaintiff. I will detail her evidence soon hereafter. The police were again called to effect arrests against the assailants but not arrests took place according to Mr Dean.

[41] Mr Dean completed his evidence describing the extent of damage to the property including the damage to the fence, gates, looting and burning of the orchard. The police arrived at the farm on 25 July 2007 and they were taken around the farm where they were shown the extent of the damage. During this process they met a trespasser by the name of Isaac Skhosana who was one of the dismissed workers. The police refused to effect an arrest even at this instance insisting that their purpose was to inspect the damage and not to arrest any people.

[42] In cross examination by Mr Phaswane for the Defendants it was stated by Mr Dean that there were about 300 striking workers. About 100 of those stay in the houses within the farm. Whereas the strike was characterised by violence, they did not evict the striking workers as to do so would have been inhumane. Furthermore, the moveable ablution facilities that were placed next to the main gate had been damaged by the strikers which necessitated access to the toilets that were inside the farm.

[43] The witness was asked if it would have been practical for the police to enter and do policing act inside a private property to which the witness responded in the positive. Mr Dean's response was premised on the basis that there had been acts of violence that were committed inside the property and there had been criminal cases opened against specific individuals coupled with video footage which should have led to the arrests but to no avail. According to the witness the arrests

only took place when Captain Mbambo himself was in the line of fire.

[44] The witness reiterated that the strike was marked with violence and they were hurled with stones, assaulted and there were acts of theft and burning of the orchards. On a question why they did not apply self-defence mechanisms to defend themselves he responded by stating that the striking workers were their employees and they did not want to meet force with force. However, in about two occasions, Mr Roy Plath (father to the witness) fired gunshots to ward off attacks where there was risk to life.

[45] Mr Dean testified that he did not believe the police when at a stage they said that they do not have capacity to assist. He stated that he called them on each instance that there were unlawful incidents but they just did not come. He confirmed that the police came to the farm on the 14th July 2007 and he took them around the farm indicating the

extent of damages. He did not mention this particular date of the 14th in his evidence in chief nor was it mentioned on his diary as by this time a lot of damage had already taken place he said. Furthermore, he stated that his diary recorded incidents that had a bearing on the direct farm operations and not the visit by the police to take photographs of the damaged property.

[46] The witness was questioned at length about his expectations from the police and further that it could not have been expected of the police to be at his premises throughout the strike. He explained that in most instances when the police arrived at the farm there would be calm by the striking workers which indicated that the strikers respected the presence of the police. According to him if the police arrested the instigators well in time when the acts of violence were taking place, there would not have been extensive damage.

[47] The witness confirmed that on 9 July 2007 four suspects were arrested two of whom were the instigators. He had no knowledge that the Senior Public Prosecutor declined to prosecute the four suspects. He also confirmed the arrest of three suspects on the 13th July 2007 and one other the following day being the 14th July 2007.

- [48] The witness confirmed that he was not personally present when Ms Alida Mkhabela got injured and as such did not see what happened. His account of the story derives from Ms Mkhabela herself.
- [49] The next witness that testified is Ms Alida Mkhabela who stated under oath that she is employed by Mr Dean at Umbhaba as a driver. At the time of the strike she was a packer at another farm (Umbhaba 2) belonging to Umbhaba. On 24 July 2007 she was ferried to Kiepersol farm to assist after a number of striking workers were dismissed. She was in a group of other workers who were transported from Umbhaba 2 to Kiepersol.
- [50] Upon arrival at Kiepersol they proceeded to the packing house where they started packing the fruit. After a while she had a call of nature and proceeded to the bathrooms which are inside the yard. Whilst at the bathroom she heard a commotion outside. She exited the bathroom and saw that the noise was made by the striking workers. The striking workers were inside and outside the packing house.
- [51] She was struck with a bottle, screamed and ran to the police who were inside the yard of the farm operations. She sustained an open wound on her right leg next to her knee. Whereas the police were approximately eight meters away from her, they did nothing to assist her. According to her testimony the police saw what happened to her and she was expecting assistance from them. The strikers had knobkerries and encircled her forcing her to join the strike.
- [52] After the injury she was taken to Doctor Nel who cleansed the wound and applied stiches and gave her some medication. She then went home to recuperate. She now remains with a scar and she is very heartbroken about what she had to endure on that day. The Court was referred to pictures where the police and police vehicles were clearly visible.
- [53] In cross examination she stuck to her version that the police saw her that she was injured but did not come to her rescue. The police, according to her were facing her direction and should have seen her getting injured. Whilst she did not specifically ask for police assistance her version is that they were facing her direction. At that moment the witness became very emotional and shed tears resulting in the Court taking a short break.
- [54] The witness could not recall if she was taken to the doctor by Mr Dean or Mr Dumisani who was her supervisor. She further could not recall if she made and signed a statement at the police station when she opened a criminal case of assault with intent to cause grievous bodily harm. Neither could she recall that there was a suspect who was arrested for causing her injury. She was however steadfast that she never went to court to testify on her case. This ended the testimony of the

First and the Sixth Plaintiffs whereafter they closed their case.

- [55] Two witnesses were called on behalf of the Defendants, the first being Captain Lukiel Shadrack Makwakwa. He testified that he has thirty three years' service in the police service and that in 2007 at the time when the strike took place he held the rank of an Inspector and was stationed at Hazyview police station under Crime Prevention Unit.
- [56] He together with other police officers went to the Kiepersol farm on 5 July 2007 as there was an industrial action taking place at there. They were in two police vans and were later joined by other colleagues of his in a mini bus. The Kiepersol farm self is approximately fifteen kilometres from the police station.
- [57] Upon arrival at the farm he observed approximately fifty employees who were outside the farm and were singing songs and were protesting. They disembarked from their vehicles and observed the situation. He was then approached by two union members who requested him to accompany them to the locked gate providing access to the main building since they wanted to talk to the employer of Kiepersol farm. He together with other police officers accompanied the two union officials to the gate.
- [58] At the gate the employer was called by a security officer. At this moment the striking workers were further away and did not form part of the delegation to the gate. At the gate the union officials spoke to Mr Dean but did not reach an agreement. After reaching the stalemate the union officials were escorted back to the striking workers. The union officials had some discussions with the strikers and after a while everybody dispersed.
- [59] He testified that they did not enter the premises as they did not have any complaint. The only reason for their presence was to make an observation since there were striking workers. There was no person who was injured nor did he see any damaged property or burning tyres. They then patrolled the area to see if everything was in order and having satisfied himself they then left the scene. He did not go again to Kiepersol farm until on 1 August 2007 when he went to effect

an arrest of a suspect who was arrested of theft of bananas.

- [60] Captain Makwakwa testified that there are eight officers per shift who work in the Crime Prevention Unit. Four of these officers conduct patrols travelling in two per each vehicle and another four remain in the Community Service Centre. Their shift commences at 6h00 until 18h00 when they will be relieved by another shift.
- [61] In cross examination by Mr Labuschagne he stated that he was informed of the strike through a police radio whilst they were on patrol. He confirmed that Superintendent Nobela was a station commander at the time of the strike. There was no information that was shared with them of the strike at Kiepersol. Normally they would be advised at the police parade of all incidents that are taking place but they were not informed about this particular strike in any parade that he attended.

[62] His testimony upon being confronted about his earlier version that he first visited the scene on 27 July 2007 was that it was a mistake as he first visited the scene on 5 July 2007. He went to Kiepersol once during the month of the strike. He disputed that the striking workers were around three hundred and that his estimate was that the strikers

were about fifty in number. He further disputed that the person who was talking to the strikes between the locked gates was Mr Roy Plath but rather Mr Dean. He also did not see that Mr Roy Plath was upset. Strangely, he also did not see one of the union members attempting to grab the camera that was taking the footage of the discussions at the gates although this was very clearly visible to the Court.

[63] The next witness called on behalf of the Defendants was Brigadier Theogang David Makatane who is himself a member of the SAPS based at the Legal and Policy Services at Mpumalanga Provincial office based in Nelspruit. In July 2007 he was a Senior Superintendent which rank was later changed to Colonel. His role in the police is to provide advice, conduct training and attend to civil litigation.

[64] He recalled a request by Superintendent Nobela who asked that he visits Umbhaba Estate to explain a court order and provide them with an advice. He does not recall the exact date but his visit was after the employer had obtained a court order against the strikers. On his arrival at Kiepersol there were about twenty but not more than thirty people near the gate who were chanting and singing songs. He was introduced to other police officers who were on the scene by the station commander and was handed the court order. In his company was the station commander, other police officials and a Manager whose name is either Mr Roy Plath or Mr Dean.

[65] A discussion was held after reading the court order and he, with the assistance of other SAPS members measured the distance of five hundred meters as the designated area of where the picketing should take place. The striking workers moved to the identified place and when he left the scene the strikers had moved. He also testified that he advised members of the Crime Prevention Unit to monitor compliance with the court order. He never visited the premises again nor was he called to be informed of any acts of non-compliance. He denied ever intimating to Mr Dean that he would rather join the strikers to avoid

injury rather than confront them to stop the acts of violence.

[66] Brigadier Makatane did not remember and as such could not deny that he visited the scene on the 12th July 2007 after a second court order had already been obtained. He however denied that the strikers only moved on the 16th July 2007 as according to his version, the strikers moved away on the same day that he visited the scene. In his testimony he only visited the scene once and gave instructions that the compliance with the order be monitored. He does not know what took place when he had left.

[67] The matter was adjourned for two days at the request of the Defendants since they sought to call other witnesses who were not present at Court. The matter was indeed postponed on the proviso that the Defendants shall bear the costs of the postponement. On 11 March 2021 when the matter resumed, the Defendants closed their case since they could not secure further witnesses.

The

issues

[68] In the light of the pleaded case it appears to me that the following issues require determination:

68.1. Whether the police owed the Plaintiffs a duty of care in terms of the common law, the applicable provisions of the Constitution and any other enabling legislation;

68.2. Whether the police's conduct was wrongful;

68.3. Whether the police were negligent; and

68.4. Whether the conduct or omission by the police resulted in damage or injury.

Evaluation

[69] It is common cause that from the 5th of July 2007 up until about the 27th July 2007 there was a strike at the Kiepersol farm in Hazyview which is owned by the First Plaintiff. It is not disputed that this strike was characterised by violence and intimidation which resulted in arrests of some of the suspects. The First Plaintiff obtained three court orders on an urgency basis in an attempt to properly manage the striking workers. The majority of these workers were dismissed after disciplinary enquiries were held. It is also not in dispute that the First Plaintiff suffered damages as a result of the strike through burning of the orchards, failure to access the farm and further damage to farming equipment (tractor) and to a vehicle.

[70] The Plaintiffs pleaded case is that they persistently and repeatedly requested the assistance of the police to prevent the strikers from committing various acts of violence, to comply with the court orders and generally maintain public order.[1] They go on to assert that the police failed to take any action, alternatively that they failed to take adequate action to impede the various unlawful actions of the striking workers. [2]

[71] In response to the main cause of complaint against the Defendants, the Defendants admitted the various requests for assistance. [3] The Defendants further pleaded that adequate action was taken and arrests were made to restore order as and when requested by the Plaintiffs.[4] It was never the case of the Defendants that they lacked sufficient resources to restore order thereby pleading justification. The testimony of Captain Makwakwa that they advised the Plaintiffs to talk to the striking workers as they lacked capacity can accordingly not be sustained by the pleadings.

[72] It is trite law that a party in litigation has to be apprised of the case that he/she has to meet. The Defendants specifically pleaded and throughout the trial, except the limited portion of Captain Mbambo, have been steadfast that the police took adequate steps to prevent the violence during the strike. In the matter of *F v Minister of Safety and Security*[5] Froneman J in his minority judgment affirmed that wrongfulness can be avoided only by pleading some form of justification for the breach of the legal duty. The case before me has no such justification nor was the Court persuaded that such justification was in existence.

[73] In my view the starting point is to determine the prescripts contained in our Constitution that define responsibilities of the South African Police Service to safeguard and protect the populace and property. Section 205

(3) of the Constitution bears relevance and provides that:

"(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

[74] Furthermore, section 13 of the Police Act[6] assigns specific duties to members of the police. The relevant provision thereof reads as follows:

"(1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official."

[75] It cannot be disputed that there are a number of fundamental rights of people that were affected by the strike both before the court orders were obtained and thereafter. I say this as a result of injuries sustained by some of the workers, blockading the entrances to property and damage to property. Section 7(2) of the Constitution enjoins the state to respect, protect, promote and fulfil the rights contained in the Bill of Rights. The police are also obliged to comply with their self-crafted Standing Orders amongst which is standing order 262 which provides requirements to manage a crowd as in the case of the striking workers.

[76] The next point I propose to deal with is the conduct or omission on the part of the police. Can it be said their conduct or omission was wrongful. In the matter of *Mashongwa v Passenger Rail Agency*[7] the Constitutional Court indicated the following:

"[19] Khampepe J pointed out in *Country Club* that:

'Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful.'

In my view that principle remains true whether one is dealing with positive conduct, such as an assault or the negligent driving of a motor vehicle, or negative conduct where there is pre-existing duty, such as the failure to provide safety equipment in a factory or to protect a vulnerable person from harm."

- [77] The version of Mr Dean was clear and consistent in all respects. He produced for the Court a clear chronology of events together with a list of mobile numbers and to whom each number belonged to. The critic by Mr Phaswane that he allowed the striking workers to remain in the farm is rather unsympathetic to the striking workers. These workers had nowhere else to go but staying in the farm with every right to strike for their rights. To expect the Plaintiff to have evicted them is rather drawing a short straw. I find nothing untoward on the manner in which the First Plaintiff dealt with the strikers preferring to follow the legal route than the other way round.
- [78] Ms Mkhabela suffered injuries on the 24th of July 2007 and does not know who through her with a bottle. That is the summary of her evidence which is not disputed. Whether she was taken by Mr Dean to the Doctor or someone else, in my view, nothing turns on it. What is important though is that the police were in close proximity to her and inside the premises when she suffered injuries and no immediate arrest took place but only after she opened a criminal case.
- [79] In this case the Defendants acknowledged that they have received all the requests for assistance. This is before the actual commencement of the strike on 5 July 2007. Indeed there were police officials on the scene on that day according to the evidence. It is on this day when Captain Makwakwa arrived with his colleagues and they approached Mr Dean together with Mr Plath in the company of union officials. According to Captain Makwakwa there were no violent events that required their intervention.
- [80] That there were no violent events as per his testimony the Court finds somewhat strange. The Court confronted him with a video footage shown to the Court where one of the union officials violently attempted to grab the camera from Mr Dean. Captain Makwakwa is himself clearly visible in the footage but he was steadfast that he did not see the incident. Furthermore, on the same video footage, it was clear to the Court that the parties were not in a cordial conversation. They were shouting at each other. The manner in which the parties were talking to each other should have been a clear sign that the strike had to be monitored. Notwithstanding this incident Captain Makwakwa and his colleagues left the scene after some fifteen minutes.
- [81] It is also astonishing that Captain Makwakwa, based in Crime Prevention Unit, who patrol amongst other areas the Kiepersol vicinity, never again patrolled the area where there was an ongoing strike. What is even more shocking is his response on a question by the Court that they were never informed of a violent strike during their daily parades. The Station Commissioner, Superintendent Nobela, was frequently telephoned on her mobile phone and that this matter was never raised with those that conduct patrols is rather bizarre.

- [82] The Court cannot fault the evidence of Brigadier Makatane. He came to the scene to provide advice which he did and that was the last visit to Kiepersol farm. Importantly, he provided advice to the police officials that they must patrol the area from time to time to ensure that the strike is peaceful. He was in the company of the Station Commissioner at the time, Superintendent Nobela. This clearly did not take place according to the evidence of Captain Makwakwa.
- [83] The Station Commissioner who appears to have known about the violent strike together with Captain Mbambo did not testify for the Defendants. They undoubtedly could have shed some light on what happened during the month of July 2007. The attitude of the police in managing the strike was more reactionary to the violent events that took place and almost like a "don 't care" in my view.
- [84] It is clear from the evidence that each time the police made a presence there was some measure of calm and co-operation from the strikers but soon as they left the incidents of violence commenced. The police could have just informed each shift to patrol the area and monitor if there are any acts of violence. This could have at least mitigated the level of lawlessness that took place.
- [85] The police had a legal duty to act positively to prevent harm to the Plaintiffs. The legal convictions of the community required of the police to act more swiftly to prevent harm to the Plaintiffs[8]. The legal convictions of the community incorporate constitutional values and norms and in our constitutional democracy it cannot be acceptable of the police to sit idle when they should have reasonably foreseen that the strike will turn violent. When a crime is imminent and foreseen it is expected of the law enforcement agency to take appropriate action. The duty of the police to provide assistance arises from their mandate to carry out law and order.
- [86] Mr Phaswane for the Defendants referred the Court to the decision of Blue Mountain Productions CC and Another v Minister of Police[9] . Similarly in this case there was a widespread labour unrest in the Witzenberg Valley where protesters were damaging property, looting and torching orchards. It was argued that the police's response was not sufficient. In that case the Western Cape Division concluded in favour of the Defendants and stated that the strike was widespread and unprecedented in the history of the Western Cape farming region.
- [87] The Blue Mountain case is distinguishable from the current case in my view. The strike and unlawful acts were confined to Kiepersol farm and not the whole of Mpumalanga area and not even all three farms owned by the First Plaintiff. There was no need of additional deployment of police. The police had the capacity to patrol the area and conduct continuous monitoring which they failed to do. Their failure to respond to various pleas for assistance was not only negligent but wrongful.

[88] I am persuaded that the Plaintiffs have succeeded in proving on a balance of probabilities that the conduct of the police viewed against the legal and public policy considerations, constitutional norms and values was unacceptable and accordingly unlawful. If the police had responded to a number of requests from the First Plaintiff and patrolled the area, the likelihood is that the damage would not have eventuated.

Application for a postponement

[89] Now I turn to the application by Mr Labuschagne that the case of all the other Plaintiffs who did not participate in these proceedings should be postponed sine die since they did not know of the date of trial and further that it shall be in the interests of justice to do so.

[90] There are two groups of these Plaintiffs, the first group consist of those who withdrew their claims against the Defendants and, the second group consist of those who did not participate in the proceedings resulting in the attorneys of record withdrawing for lack of instructions. The reasons proffered by Mr Labuschagne is that the whereabouts of many of these Plaintiffs is unknown and as such they could not provide full and further instructions to their attorneys. It is for that reason primarily that a postponement is sought.

[91] I accept that these Plaintiffs were all farm workers and some even seasonal workers who go back and forth from various areas depending on the season. It is equally so that careful consideration should be taken in deciding whether their cases should be dismissed for lack of participation in these proceedings in the light of the interests of justice. On the other hand the Defendants are equally entitled to closure and finality of these proceedings.

[92] The Court cannot speculate on the exact reasons why these Plaintiffs failed to provide instructions to their appointed attorneys. There was no evidence led as to the reasons for their absence or lack to provide full instructions. As the Plaintiffs it was incumbent upon them to make enquiries about the progress of their case wherever they find themselves. To expect the Defendants to litigate again on this matter due to failure by these Plaintiffs would, in my view, be against the interests of justice. At any rate once the Counsel for these Plaintiffs has withdrawn on their behalf, it seems to me, they no longer have mandate to represent them. I am not persuaded that it will be in the interests of justice to postpone this matter for

non-participating Plaintiffs as reasoned above . The fate of the two groups of Plaintiffs' should be dealt in the same way as there was no evidence led on their behalf except the evidence of the First and the Sixth Plaintiffs.

Costs

[93] The general principle is indeed that the successful party is entitled to his/her costs. In the main the First and the Sixth Plaintiffs have been successful in demonstrating that the conduct of the police was unlawful and thereby wrongful. That is not the end of the matter as the Defendants have equally been successful in persuading the Court that the claims of the other Plaintiffs should be dismissed.

[94] In so far as costs are concerned for the non-participating Plaintiffs I am inclined to consider the Biowatch principle the purpose of which is to shield unsuccessful litigants from the obligation of paying costs to the state. I am aware that this is not a constitutional matter per se where the principle was developed but, in my view, it does involve a number of constitutional principles. I cannot find that their conduct leading to the dismissal of their case warrants a decision to award costs against them. As indicated there may be various reasons leading to their failure to provide further instructions to their representatives.

[95] As a result I make the following order:

1. The Defendants are liable to pay the proven or agreed damages of the First and the Sixth Plaintiffs arising from a strike that took place in July 2007 as a result of their wrongful and negligent conduct;
2. The Defendants shall make payment of the First and Sixth Plaintiffs'

taxed or agreed party and party costs on the High Court scale which costs shall include, but not limited to (subject to the taxing

master's discretion) the following:

- 2.1. The reasonable fees of Senior Counsel and Junior Counsel from 1 March 2017 to 17 March 2017;
- 2.2. The cost of sworn translator in respect of the evidence of Ms Alida Mkhabela;
- 2.3. The cost associated with the hosting of the trial proceedings at the offices of Adams and Adams as agreed to by the parties;
- 2.4. The cost of the stenographer.
3. The First and Sixth Plaintiff shall allow the 14 (fourteen) court days to make payment of the agreed or taxed costs from date of settlement or taxation thereof.
4. The claims of the following Plaintiffs: 2 to 5, 13 , 20 , 23, 37, 41, 44, 52 7 to 12, 14 to 19, 21, 22, 24 to 36, 38 to 40, 42, 43, 45 to 51 and 53 are dismissed with no order as to costs.

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Plaintiffs :

EC Labuschagne SC (with him SG Maritz)

Instructed by:

Adams & Adams

Counsel for the defendants:

MS Phaswane (with him SK Sioga)

Instructed by:

The Office of the State Attorney, Pretoria

Date of hearing :

1 march 2021 to 17 march 2021

Date of judgment:

20 may 2021

[1] See para 18 of the Particulars of claim

[2] See para 19 of the Particulars of claim

[3] See para 12 of the Defendants Plea, p89

[4] See para's 13, 15 and 17 of the Defendants Plea, p91

[5] F v Minister of Safety and Security & Others 2012 (1) SA 536 (CC) at para 118

[6] The South African Police Service Act 68 of 1995

[7] Mashongwa v Passenger Rail Agency of South Africa 2016 (3) SA 528 (CC) at para 19 23 I

[8] See Van Eden v Minister of Safety and Security 2003 (1) SA 389 (SCA)

[9] Blue Mountain CC and Another v Minister of Police 2020 SALR (4) SA 401 (WCC)

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