Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 2750/2018
Heard: 19 - 23/04/2021;11/04/2022
Argued: 29/07/2022
Delivered: 30/09/2022

In the matter between:

HERRY PRETORIUS Plaintiff

and

MINISTER OF POLICE Defendant

JUDGMENT

Mamosebo J

[1] This case is a typical example of a service delivery protest that went wrong at Jacksonville, Roodepan, in the Northern Cape Province. The action involves a delictual liability claim by plaintiff, Mr Herry Pretorius, for damages against the defendant, the Minister of Police, for injuries he sustained to his left eye. At the commencement of the trial, liability and quantum of damages were separated. Liability will be determined at this stage. Adv. SL

Erasmus represented the plaintiff and Adv. D Olivier represented the defendant.

[2] The following facts were either admitted in the exchange of pleadings or not seriously disputed by the defendant. On 21 April 2016 in the afternoon, the plaintiff sustained an injury to his left eye around the Jacksonville vicinity in Roodepan resultantly causing him to lose his left eye, suffering permanent loss of vision. It happened in a built-up, high-risk area.

[3] The said service delivery protest was monitored by members of the South African Police Service (SAPS). According to the SAPS prescripts they were required to use the minimum force necessary to subdue and disperse the crowds; maintain law and order and protect life and property; perform their official duties with due regard to their powers, duties and functions and in a manner that is reasonable under the circumstances. The police may only use rubber bullets to disperse the crowd in extreme circumstances and if less forceful methods proved to be ineffective. The SAPS commanders and all the other members were at all times acting within the scope and authority of their employment.

[4] The plaintiff is an adult male informally employed as a "jump boy"[1] for about six years in the taxi industry and resides at Aspen Street in Jacksonville, Roodepan, Kimberley. The Minister of Police is a member of the Executive in the national government, responsible for the actions of the police cited in his official capacity as the nominal defendant in terms of the State Liability Act[2].

[5] The issue for determination is whether the Minister should be held liable for the damages suffered by the plaintiff.

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[1] As explained by the witness, a jump boy in the taxi industry is an assistant driver who opens and closes the taxi door for commuters and helps them load or offload their goods from the taxi.

[2] 20 of 1957

[6] On 14 November 2018 the plaintiff instituted action for damages against the Minister. He pleaded that during the afternoon of 21 April 2016 and at Roodepan an unknown member of the police assaulted him by firing a rubber bullet at him. In the alternative, that the unknown shooter negligently fired a rubber bullet at him in a residential area where members of a community, including children, were engaged in service delivery protests, whilst he did not engage in such protests. The shooter and/or his commanders acted wrongfully and were negligent resultantly causing him to suffer damages.

Plaintiff's evidence and case

[7] The plaintiff, an unsophisticated 30-year old, whose highest academic achievement is Grade 5, testified and called three witnesses, Lena Magdeline Gewers (aunt Lena), Dirk Pretorius (Oom Dirk) and Dr Diane Dalene Towell, to testify. Plaintiff's evidence is to the effect that on 21 April 2016 he knocked off work around 12:00 midday. At past 13:00 he alighted from the taxi at the corner of Midlands and Mahogany Streets. The road was blockaded. He walked through the erven of the unfenced houses to get to his grandfather's home where he resides in Aspen Street.

[8] Plaintiff's grandfather sent him to the tuckshop to buy milk and bread. He walked to the tuckshop near Leadwood and Deanne Streets. He stepped out of the tuckshop and walked for approximately 15 meters at which point he felt something hit him in the eye. He had turned for a split second (which he described as "tjoep") to see what was happening behind him when the bullet struck him on his left eye. It was between 14:00 and 15:00. He did not know it was a bullet but heard people saying so. The bread and milk fell to the ground. Before he was shot, he saw two police officers about five meters from where he was. One was putting things in the firearm while the other was shooting. There was also

a police armoured vehicle (Casper) driving around shooting at people. He fell to his knees. He heard children shouting at the police stating that they had shot someone in the eye. He is uncertain whether the shot had come from the two police officers who were on foot or from the police who were in the armoured vehicle.

[9] **Lena Gewers**, whom the plaintiff refers to as aunt Lena, arrived on the scene and took the plaintiff to his grandfather's place. Dirk Pretorius and Eden assisted her. The three of them later accompanied the plaintiff, who had covered his bleeding eye with his T-shirt, on foot, to Roodepan Police Station, at the corner of Midlands and Eagle Streets, to lay charges against the police.

[10] Ms Gewers saw the plaintiff around 14:00 passing through her yard. He was uninjured then. Shortly thereafter she saw the plaintiff passing her home again towards the tuckshop. She was standing outside her home. She heard a person screaming and uttering the words in Afrikaans "*eina"* and "*my oog".* She rushed towards the plaintiff and found him holding a T-shirt to his eye. There were not many people around. She saw a police truck parked nearby shooting at random at people who were fleeing from it. She took the plaintiff to his grandfather's home. Ms Gewers reported to the police that the plaintiff was shot. Although the police had summoned an ambulance she left and returned to her home before it could arrive. The plaintiff remained in the company of his uncle and Eden.

[11] After a long wait at the police station the police informed them that the ambulance would not fetch him, so they returned to his grandfather's home. The ambulance only arrived around 23:00 and conveyed the plaintiff to Kimberley Hospital where he only received medical treatment the following morning and was hospitalised for five days.

[12] **Mr Pretorius testified that he resides in the same house with the plaintiff and his grandfather**. When the plaintiff returned home from work on 21 April 2016 he was uninjured. Shortly thereafter he went to the tuckshop. He returned from the tuckshop accompanied by Ms Gewers and Eden and his eye was shattered (out). He, Ms Gewers and Eden helped support the plaintiff to the police station. By dusk, when the ambulance had not arrived, they walked back home where they waited until its arrival at around 23:00. Pretorius denied having been part of the protest action and was also not at the scene where the plaintiff was injured.

[13] **Dr Towell is the medical doctor who examined the plaintiff on 22 April 2016 and completed a J88 Form**. Her findings were that the plaintiff had sustained periorbital bruising around the eye region or socket with conjunctival swelling and bleeding. The eye was blind. The doctor concluded that the plaintiff sustained a rubber bullet injury to his left eye, ruling out the likelihood of the injury being caused by a stone or a brick, which would not have had such a strong projectile. A brick would have caused a more extensive injury.

[14] After the plaintiff was discharged from hospital he reported the incident at Roodepan Police Station. One Uncle T (full names unknown) took him to the Provincial Head of the police who gave him forms and advised him to report the matter to the Independent Police Investigative Directorate (IPID). A case docket under CAS189/4/2016 was opened and IPID investigated the case. There was no photo or any other identity parade conducted because he would not identify the shooter.

[15] It is the plaintiff’s case that the shooter and the commanders acted wrongfully and were negligent because there were no plans or contingency plans, alternatively that there were inadequate plans

put in place to disperse or control the protestors. The shooters and their commanders were not properly trained or briefed. Because of this inadequate planning, briefing or training there was confusion among the commanders and the shooters. The commanders did not, under the circumstances, exercise reasonable care in the planning, briefing, implementation, command and control of any operation to minimise the risk of violence. The commanders did not exercise control over the shooter resultantly causing the shooter to utilise excessive force. The actions of the commanders and the shooters were contrary to the law, policies, standing orders or instructions of the police.

The Defendant's case

[16] The defendant disputes that there was a shooter and that a member of the SAPS shot the plaintiff with a rubber bullet. The defendant further denies that the SAPS members acted wrongfully, intentionally or negligently. In the alternative, should the Court find that the plaintiff was shot as alleged, the defendant pleaded that the police did not act negligently or unlawfully but out of necessity when they used the rubber bullets to disperse the crowds. Their action was to prevent injuries to persons and damage to property. The defendant further pleaded that there were adequate plans in place and reasonable care was taken in the planning, briefing, implementation, command and control to disperse the protestors. They took reasonable steps to minimise the risk of violence and injury to persons or damage to property. They deny the use of excessive force when controlling or dispersing the protestors.

[17] Only one witness, Lt Col Pieter Jansen, testified for the defendant. His evidence was that on 21 April 2016 he had been the Operational Commander of the Public Order Police (POP) for 6 years. He has been a member of the POP, a unit responsible for crowd management in any violent situation, for 23 years. He is

currently the Station Commander at Roodepan Police Station. At the time of testifying, he had served the SAPS for 28 years.

[18] Lt Col Jansen commenced his testimony by sketching the principles, regulations, policies, National Instructions etc, pertaining to protest action or a volatile or riotous situation. According to him the Technical Response Unit (TRT) is another unit in the SAPS that will be called in to assist the POP unit should a dangerous situation arise. They will be under the command of the POP Operational Commander, in this instance, Lt Col Jansen. Several Occurrence Books (OB's) are kept at the police station purely for purposes of recording incidents. There is another OB kept in the operational room. Each unit has its own OB. The incidents must be recorded soon after they have occurred, time and description must be entered and they follow chronologically. A late entry is also permissible.

[19] IRIS stands for Incident Report Information System. It comprises a computer-generated report from all the information captured in the OB. The people responsible for IRIS are trained and located in the operational room. They receive information of incidents throughout the day and update the IRIS. Members of POP operate the operational room 24 hours a day.

[20] There is a National Instruction 4/2014: Public Order Police Crowd Management during Public Gatherings and Demonstrations. This document consists of police orders and policy applicable to POP for crowd management. Each member of the service, more particularly, the POP and TRT, is furnished with a copy and must abide by its instructions.

[21] There are several approaches available to the SAPS in instances of dispersing crowds. The first is the soft approach which entails the members of the SAPS approaching the situation unarmed and

without vehicles. However, should a need arise or the situation demand otherwise, for example when stones are pelted, then nothing stops the members from changing to the second approach of using stun grenades, which only emits a sound. Should the situation pose further danger to lives by protestors pelting stones at the police or property or other people, the situation will demand the use of either water cannons or rubber bullets. These will be under the command of the operational commander. A warrant officer or an officer of a higher rank is authorised to give instructions to the subordinate members to disperse the crowds and to arrest any person(s) identified in the commission of a crime. Teargas is used when an observation is made that the crowds are not listening and there is a threat of attack towards the police and the situation is assessed as dangerous. The SAPS members must stop pursuing the crowds when they flee in different directions. Either a W/O or any trained person who is able to assess the situation can give the instruction to cease-fire when the people are fleeing and the element of danger is eradicated. The OB and IRIS will be updated.

[22] Lt Col Jansen testified that the protest actions were in various places in Roodepan on that day with the protestors barricading roads. He became aware thereof at 03:00 in the morning when he reported for duty. The protest started at the graveyard. The first recording in IRIS on 21 April 2016 was a report by W/O Magau at 03:40 for an unrelated matter at Ivory Park which is not within the Jacksonville vicinity. The subsequent reports made were the following: at 06:40 there were approximately 30 people at the Roodepan cemetery which is less than a kilometre from Mahogany Street; about 20 people at Jacksonville scattered along the main road at entrances to the area. W/O Coetzer reported that at 07:35 about 30 people threw stones at the water cannon in Starling Road, far from Jacksonville, and water cannon was used to disperse them. Lt Col Jansen reported that at 07:58 the crowd was moving to

Barkley Road and he gave an instruction to disperse the crowd. He hurled one stun grenade. Cst Lepotha fired one T smoke grenade with a shotgun and one stun grenade. Cst Dunster shot one rubber round with a shotgun. No injuries were reported to POP.

[23] After 16:00 senior members of the police had gathered at the cemetery in the company of Brigadier Sibili. Whilst there, the Brigadier alerted Lt Col Jansen that the crowd was barricading the roads and instruction was given to the members to disperse the crowd and to clear the roads. That took place on Midlands Road near Mahogany Street, next to Jacksonville. The dispersing crowd ran into the residential area.

[24] Lt Col Jansen was not aware of any instruction to any POP member between 13:00 and 15:00 on the day of the incident to enter the residential area of Jacksonville either on foot or by Nyala[3]. According to him there was no instruction given to use rubber bullets, gas or stun grenades on that day to disperse the crowds. Had that been the case, they would have been recorded in IRIS.

[25] Lt Col Jansen explained that in terms of the National Instruction 4/2014, there must be a videographer who will at all times record the activities of the crowds and their dispersal. The videographers have received specialised training for this job. In this instance, however, there was only one videographer despite there being several activities at different places. Lt Col Jansen did not personally view any of the footages before attending the trial. He conceded that there was nothing in the video footages depicting the dispersal of the crowds and the type of ammunition used on 21 April 2016. This could also not be determined from IRIS. Although a record or register (Form SAP 108) must be kept concerning firearms and ammunition allocated to each member on each specific day, he could not produce any or persuade the Court that

[3]A big armoured vehicle of the police

any record was kept or updated for the incident of 21 April 2016. He could also not say with certainty if there was any reconciliation done after the protest to determine who could have fired the shot on 21 April 2016. He further could not tell who the warrant officer was who gave the instruction from POP. Unlike the events of 21 April, Cst Sedisho accounted for rubber bullets fired the following day, on 22 April 2016 at 11:30.

[26] Just to elaborate briefly on the aspect of the video footage. As stated earlier Lt Col Jansen had not viewed any of the footages before he testified. He was cross-examined on the six video clips in respect of the occurrences of 21 April 2016. The following gives a summary of the footages:

26.1 Clip 99 (1 minute and 7 seconds) no scenes of gathering or violence, only depicts people walking along the road;

26.2 Clip 100 (11:26 – 11:29) depicts a tarred road blocked with branches and fires being extinguished with water. It shows a small crowd in the veld fleeing in the direction of a built up area. This footage corresponds with the IRIS entry made at 11:22 where W/O Coetzer reported from U-Save circle.

26.3 Clip 101 (12:08 – 12:09) no corresponding entry in IRIS. This footage shows an empty veld and an armoured vehicle driving on a tarred road with rubble strewn over the road and a few people on the road.

26.4 Clip 102 (16:18 – 16:29) no footage of any serious violent crime or damage to property or injury to persons.

26.5 Clip 103 (16:29 – 16:30) depicts police officers walking and two women walking along with them, nothing else seems to be happening.

26.6 Clip 104 (16:34 – 16:36) seemingly taken at a T-junction at the Roodepan Police Station and shows police removing rubble from the street with onlookers and cars parked on the side of the street.

[27] Lt Col Jansen was cross-examined on PTB 1 of IRIS furnishing a detailed report of the 60 rubber bullets and by whom they were fired. However, on 21 April 2016, while it is recorded that 67 ammunition were used, of which 12 bore rubber heads, five stun grenades and 12 bore tear smoke, no one can account for the remainder. Astonishingly, the entry of 21 April 2016 does not specify any names against ammunition used. It is also inexplicable why Yono and Moitsi's names are not accounted for in that entry. It is also significant that Lt Col Jansen was unable to explain what else, other than a rubber projectile, could have lodged in the eye of the plaintiff on 21 April 2016. If one accepts, for a moment, that the entry made on 22 April 2016 took into account the ammunition used on 21 April 2016, there are still 7 rubber bullets unaccounted for. Lt Col Jansen conceded, correctly so in my view, that recordkeeping, which included the keeping and updating of OB entries as well as the updating of IRIS on 21 April 2016, was unreliable.

[28] PTB 2 is a copy of a page of Lt Col Jansen's diary in respect of 21 April 2016. It does not contain any entry pertaining to his instruction, as operational commander, to disperse the crowd at 16:00 and use rubber bullets. Even after the trial was adjourned for almost a year Lt Col Jansen returned to court without having perused the Form SAP 15. This form indicates which members were on duty, at which point(s) they were stationed at on the relevant days and under whose command they were operating. This was lacking despite the fact that he referred to it in his evidence. The form could not be traced at the POP. He also did not look for or submit FORM SAP 108, which would have specified the

shotguns and firearms used by each member on 21 April 2016. The records were missing or were not discovered despite request.

[29] From the discovered portion of the diary of Capt Harmse, the entry relevant to 21 April 2016 is that he briefed members that they had to assist POP Kimberley during crowd management duties in Roodepan. At 11:00 they escorted the mayor to Roodepan. At 14:30, having been alerted by Brig. Sibili that two of his members were busy shooting, he asked Csts Yono and Moitsi for an explanation for their shooting in the direction of Jacksonville. Their explanation was that they used their discretion when they saw people hurling stones at cars passing by. Harmse instructed them to make the necessary entries in their pocket books but these were not discovered. Lt Col Jansen clarified during cross-examination that the constables could only exercise their discretion when their or other people's lives or property were in danger. He denied giving the instruction at 14:50 to disperse the crowd in the Jacksonville area. He added that there was no IRIS report or any other report that Moitsi and Yono were instructed to fire rubber bullets and that their entries were only made after the investigations by the Independent Police Investigation Department (IPID) on 12 July 2016.

Analysis of the plaintiff's evidence

[30] There is a discrepancy between the evidence of Lena and Dirk Pretorius, regarding whether they both took the plaintiff to his grandfather's place or whether Dirk was present or not at the scene as according to Dirk they found him at the grandfather's home. Another discrepancy lies between the evidence of the plaintiff and Dr Towell pertaining to when the medical certificate (J88 form) was handed to the plaintiff, but nothing turns on these aspects. The plaintiff's evidence pertaining to the averment that the eye was injured by a projectile is corroborated by Ms Gewers and Dr Towell. I am acutely aware that the defendant has not

presented an iota of evidence relating to what had led to the plaintiff's injury.

[31] The plaintiff was cross-examined at length by Mr Olivier on the OB entry dated 6 May 2016 which reflected the date and time as 21 April 2016 at 17:50; on the averments about Uncle T taking him to the '*baas van die polisie',* who called a meeting to show those in attendance what they had done to the plaintiff whereas he had told them not to shoot at people; on his affidavit although the defendant had not denied that such meeting did not take place; and on the statement made to IPID.

[32] On the aspect of the witness being cross-examined on his statement to the police, Nestadt JA commented in *S v Mkohle*[4]*:*

> *"The general rule is that a witness' previous consistent statement has no probative value (Hoffman and Zeffert The South African Law of Evidence 4th ed at 117). An exception to the rule occurs where it is suggested that the witnesses' story is a recent invention."*

I have not found any shred of evidence that suggested that the evidence of the plaintiff and his witnesses, was invented or fabricated. In fact, all the witnesses were credible and honest.

[33] Constables Moitsi and Yono, who were assisting POP with crowd management around the time when the plaintiff was injured, made statements wherein they admitted having been in police uniform and having fired rubber rounds, at their own discretion, to disperse the crowds. The time that Moitsi mentions in his statement coincides with the plaintiff's time of injury. What completes the jigsaw puzzle is Moitsi's statement that the crowd ran to the built up area (the houses). He added that both the Crime Prevention Unit and POP were firing shots at the protestors. It is recorded in the statement that during that timeframe when the plaintiff was

[4] 1990 (1) SACR 95 (A) at 99d

injured there were about 300 protestors but the number was significantly reduced to about 80 after the members had dispersed them.

[34] Uncle T was not called by either party to testify. He is employed at Roodepan Police Station where Lt Col Jansen is now the Station Commander. There is no explanation by the defendant why Uncle T and the following witnesses with first-hand knowledge of what transpired on the 21 April 2016 were not called to testify: Capt. Harmse, Csts Yono and Moitsi, Brig. Sibili, as well as the Warrant Officers who were delegated to give instructions to disperse the crowds on 21 April 2016, namely, Coetzer, Tsenoge, Mtombeki, Williams and the videographer, Ehlers. The only reasonable inference that the Court can draw under the circumstances is as enunciated in In *Elgin Finedays Ltd v Webb*[5]:

"... it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him ...".

[35] The insightful remarks by the Supreme Court of appeal pertaining to contradictions in the statements or versions of the witnesses is crisply dealt with in *S v Mafaladiso en andere*[6] where the SCA held*:*

"The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard

[5] 1947 AD 744 at 745

[6] 2003 (1) SACR 583 (SCA) at 593e – 594h translation as appearing from the headnote

the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings."

[36] The defendant pressed in argument that there were contradictions between the evidence of the plaintiff and Ms Gewers. This is a misconception because it must be borne in mind that they were at different vantage points when the shooting occurred. She heard the plaintiff scream *"eina" and "my oog".* In my view, the related versions are not incompatible or destructive of each other. In any event, the following was stated in *S v Mkohle*[7] where the court held:

"Contradictions per se do not lead to the rejection of a witness' evidence. As Nicholas J, as he then was, observed in S v Oosthuizen 1982 (3) SA 571 (T) at 576B – C, they may simply be indicative of an error. And (at 576G – H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence."

[7] **supra,** at 98f – g

I also take notice of the fact that this incident happened during a protest action and the scene was therefore not static but moving.

Analysis of the defendant's evidence

[37] Lt Col Jansen was the only witness to testify for the defendant. He carried a huge responsibility to present a coherent version on behalf of the defendant, more particularly because he was the operational commander. An astonishing factor is that there was neither an operational plan put in place, nor a proper briefing by both Capt Vava who was the POP operational commander working in conjunction with W/O Magau. Jansen's taking over as operational commander under these circumstances can be equated to a man going to war blindfolded because he states that he merely acted in accordance with the information supplied to him.

[38] Jansen did not peruse the IRIS reports for the previous three days of 18, 19 and 20 April 2016. According to him he just worked on the contingency plan, which is a document similar to a National Instruction. Although he answered in the affirmative when asked whether there was a written contingency plan in respect of the current protest he could not explain why no discovery of the contingency plan and the operational plan were made.

[39] Lt Col Jansen had opportunity at any point in time to scrutinise the video footage but up to the date on which he testified he had not viewed any of the footages relating to the various incidents.

[40] When it comes to the National Instruction 4/2014 marked "PTB2" and canvassed in detail during the trial, it became undisputed that it was not complied with. Assessing the evidence of Lt Col Jansen, particularly during his cross-examination, the following areas of discussion became conspicuous:

40.1 There was a lot of information that was not communicated to Lt Col Jansen as the operational commander (para 2(k);

40.2 The SAPS carried the responsibility to report to the operations room and IRIS. The allegations by the plaintiff were supposed to have been registered in the IRIS but no report was made to Lt Col Jansen (Para 2l);

40.3 Despite the presence of Brig. Sibili making her the overall operating commander, Lt Col Jansen still bore the responsibility for the operational execution and coordination of the operation in Roodepan on 21 April 2016 supported by commanders of different units at different areas. He was unable to state who the commanders in each area, the platoons or divisions were and who the commander was at Jacksonville on 21 April 2016 when the plaintiff was injured (para 2(q)).

40.4 The responsibility of ensuring that the Standard Operating Policy is implemented and that the directives and Standard Operating Procedures (SOP's) are circulated, reposed in Brig. Sibili. However, ensuring that these policies are discovered was the responsibility of Lt Col Jansen but he could not explain the non-discovery as advised by his legal team (para 3(7)).

40.5 Whereas paras 4(2), (3) and (4) of the National Instructions deal with operational functions and tasks of the POP units and the regulation of information management, Lt Col Jansen testified for the first time during cross-examination that the information on 21 April 2016 was relayed to Mr Matiye, the spokesperson. The prescripts are clear that there must be an operational plan but, not only was Lt Col Jansen unable to tell whether there was a plan in existence

for that day, he was also unable to explain why it was not discovered.

40.6 Para 4(3) requires the POP commander to ensure that all notices in respect of his or her area of responsibility are captured within one hour of becoming aware thereof and monitor all information registered on IRIS to ensure data integrity. Whilst all units were required to have at least one person per shift to register incidents on IRIS and one IRIS controller per unit to monitor data integrity on IRIS, Lt Col Jansen did not know who those persons were.

40.7 Para 4(4) is of significance in that it requires video camera operators to be designated and deployed by the information manager **at all events to monitor the event with evidence-based video footages** to address events identified in the threat assessment. Undoubtedly, the video footage as already referred to at para 26 (above) does not contain any footage confirming serious violence. If we compare the footage in this case with the footage described by Gamble J in the unreported judgment of *Mandhlaami v Minister of Police*[8] it pales into insignificance:

> *"[33] In reviewing the video material, one is struck by the relative patience and reticence of the police, who were severely provoked and constantly being pelted with stones, to open fire. On many occasions the police sought shelter under the footbridge or behind the Nyala's. As described above, there was an ebb and flow as the parties engaged with each other back and forth. So, when under attack the police would advance towards the protestors, cross the railway line if necessary, discharge their firearms, repulse the protestors and retreat back to their original positions. One does not see an indiscriminate and persistent discharge of firearms in an attempt to mow down the protestors.*

[8] [2017] ZAWCHC 33 at paras 33, 34 and 35

> *[34] Ultimately, the video footage shows that after about 40 minutes of persistent pelting of the police, the crowd was driven back across the public space to Malva Street, where they congregated en masse. In the result, it was the measured resistance of the police which restored relative calm to the area around the railway line, the footbridge and the electrical substation.*
>
> *[35] I should also point out that the time when the shooting took place (around 18:50) according to the cotemporaneous commentary of the videographer) generally coincides with the plaintiff's evidence as to the time when he was injured."*

Unlike the video footage in *Mandhlaami* **supra** where the Judge was satisfied that it covered the activity of the crowd of protestors in some detail and over a protracted period, the footage *in casu* is very unhelpful.

[41] There was further non-compliance in paras 9, 12, 13, 13(2), 14(2), 14(6), 14(12), 17(2) and 18(2), which I need not deliberate further on in the already punctured defence case.

[42] It is trite that the plaintiff carries the *onus* to prove the shooting and injury. Once assault is complained of it implies wrongfulness on the part of the police[9]. The *onus* will then shift to the defendant to show the lawfulness of the shooting.[10] Regard being had to the evidence of the plaintiff corroborated by Ms Gewers and Dr Towell; the circumstantial evidence of W/O Harmse's entry in the diary; the phone call by Brig. Sibili as well as Yono and Moitsi's statements, I am satisfied that the police had shot the plaintiff with a rubber bullet, which caused him the loss of his left eye.

[43] The police prescripts caution them against shooting in a populated residential area. Mr Olivier, for the Minister, invoking the principle

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[9]Bennett v Minister of Police 1980 (3) SA 24 (C) at 34 - 35

[10]Prinsloo v Van der Linde 1997 (3) SACR 1012 (CC) para 37; Mabaso v Felix 1981 (3) SA 865 (A) at 872G-H

in *Makgatho v S*[11] made the submission that it is not enough that one should reasonably have foreseen the possibility of other consequences ensuing from one's actions but that one must have actually and subjectively foreseen this possibility to found *dolus eventualis.*

[44] The test for *dolus eventualis* is twofold and trite: First, did the individual subjectively foresee the possibility of the consequences of his or her actions and, secondly, did he or she reconcile him- or herself with this possibility. See *Director of Public Prosecutions v Pistorius*[12]*.*

[45] It is plain, in my view, that the shots were fired in a built-up residential area and resulted in the plaintiff being injured. There was not only foresight of the possibility of injuring the plaintiff but the police nevertheless reconciled themselves in foresight. It must be borne in mind that Moitsi and Yono stated in their statements that they exercised their discretion when they fired shots. Not only is there no evidence to support the circumstances under which their discretion was exercised but their low ranks demanded that they should have acted under direct command or instruction of a commander or someone occupying a position of authority.

[46] The action by Yono and Moitsi is further suggestive of members acting negligently. Holmes JA succinctly set out the test for liability in *Kruger v Coetzee*[13] as follows:

"For the purposes of liability culpa arises if –
(a) a diligens paterfamilias in the position of the defendant –
(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

[11][2013] ZASCA 34 at para 10

[12]2016 (2) SA 317 (SCA) at para 29

[13]1966 (2) SA 428 (A) at 430E - F

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps."

[47] I reject outrightly the defence of self-defence. The police were armed and clad in protective riot gear. It cannot be said that their only option was to fire rubber bullets at the crowd without either the video footage depicting the extent of the danger and/or the evidence of an eyewitness for the Minister. There is therefore no evidence supporting the nature of the attack at any point in time. I am satisfied that the defendant has not established a defence of self-defence in the circumstances.

[48] The defendant raised several defences in the alternative to justify the assault, should it be found that members of the SAPS acting negligently, assaulted the plaintiff. First is that the members of the SAPS acted out of **necessity** and under the belief that there was danger or injury to persons and damage to property. In *Chetty v Minister of Police*[14], where a police dog in the process of the police controlling an unruly crowd outside a furniture shop bit the plaintiff, Kriek J summarised the approach to be followed for necessity to constitute a lawful defence in these terms:

"In the present context I consider that the police can only escape liability for harm caused by them if the following requirements are satisfied:

1. There must have been reasonable grounds for thinking that, because of the crowd's behaviour, there was such a danger (commenced or imminent) of injury to persons or damage to or destruction of property as to require police action. Whether or not such a situation existed must be considered objectively, the question being whether a reasonable man in the position of the police would have believed that there was such a danger. It has been said that this is the approach in relation to the requirements of the defence of necessity…

[14] 1976 (2) SA 450 (N) at 452F – 453C

2. *The means used in an endeavour to restore order and avert such danger, and resulting in one or more members of the crowd being injured, were not excessive having regard to all the circumstances, such as the nature and the extent of the danger, the likelihood of serious injury to persons, the value of the property threatened, etc. It is apposite to note in this regard that whilst the Courts will be astute to protect the public from high-handed action on the part of the police, -*

'The very objectivity of the test, however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted. The Court must be careful to avoid the role of the armchair critic, wise after the event, weighing the matter in the secluded security of the Court room.'

(per Van Winsen, AJ. (as he then was), in Ntanjana v Vorster and Minister of Justice, 1950 (4) SA 398 (C) at p 406).

At p410 of the same report, the learned Judge said:

"The law requires of the police no higher and no less a standard of duty than is required of any member of the public placed in a similar situation, viz. that standard to which the ordinary and reasonable man in the street is required to conform.""

[49] To substantiate the defence of necessity, Mr Olivier, urged me to consider that since the situation was extremely fluid and volatile, and that protests took place at several points, it sometimes became necessary for members to follow their instincts and not necessarily implement the policies and procedures to the letter.

[50] In *Petersen v Minister of Safety and Security*[15] Brand JA approached the defence of necessity this way:

"[11] Can it be said that in these circumstances the police action which caused Justin's injuries does not attract liability because it was justified in circumstances of necessity? Unlike self-defence – also referred to as private defence – the defence of necessity does not require that the

[15] [2010] 1 All SA 19 (SCA) at para 11

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' 8(1) Lawsa (2ed) by J R Midgley and J C van der Walt, para 87:

'An act of necessity can be described as lawful conduct directed against an innocent person for the purpose of protecting an interest of the actor or a third party… against a dangerous situation…
Whether a situation of necessity existed is a factual question which must be determined objectively…
A person may inflict harm in a situation of necessity only if the danger existed, or was imminent, and he or she has no other reasonable means of averting the danger…
The means used and measures taken to avert the danger of harm must not have been excessive, having regard to all the circumstances of the case…'." (emphasis added)

[51] In my view, had the videographer produced 'evidence-based' video recordings and/or the members who partook in the crowd control and dispersing of the crowds testified to the grievous nature of the situation objectively illustrating that the police were charged at or innocent members of the community or property faced imminent danger when shots were fired, the submission by Mr Olivier might have carried some weight. However, to the contrary, at the stage when the police were firing rubber bullets the crowd was fleeing into the residential area. More so, there is no evidence before me that the police had tried everything else to bring the crowd under control and restore order before resorting to firing rubber bullets. In the absence of evidence from the defendant to that effect, the alleged volatility remains unsubstantiated.

In the result, the defendant has not discharged the *onus* of establishing that the conduct of the police officers which caused the plaintiff's injury was not wrongful and was justified by necessity.

[52] The defendant further pleaded **contributory negligence** contending that the plaintiff accepted the risk of injury to himself and contributed to his own injury, in terms of the principle of **voluntary assumption of risk**. Mr Olivier is dealing here with two separate defences conflated in one. The two defences are dealt with in *Santam Insurance Co. Ltd v Vorster*[16]. Ogilvie Thompson CJ in *Vorster* pronounced upon the distinction[17] when he held:

> *"As appears from what I have already said, the defence of volenti non fit injuria has long been recognised in South Africa. The respective criteria for the defence of volens and for that of contributory negligence are, theoretically, radically different. The former entails a subjective enquiry related to the particular plaintiff, while the latter calls for an objective enquiry in conformity with the standard of the bonus pater-familias."*

[53] The question to be answered is whether the defendant has established the defence of *volens.* The insightful remarks by Ogilvie Thompson CJ in *Vorster*[18] continued:

> *"I am accordingly of opinion that, if it be shown that, in addition to knowledge and appreciation of the danger, the claimant foresaw the risk of injury to himself, that will ordinarily suffice to establish the "consent" required to render him volens – provided always that the particular risk which culminated in his injuries falls within the ambit of the thus foreseen risk. The inherent difficulty that the central factum probandum – viz. the consent to the particular risk which occasioned the supervening injuries – is basically a subjective enquiry can, I suggest, only be bridged by way of inference from the proved facts. In the nature of things, direct evidence will seldom, if ever, be available; and manifestly the negative ipse dixit of the claimant himself can by itself usually carry but little weight. The Court must, in my view, thus perforce resort first to an objective assessment of the relevant facts in order to determine what, in the premises, may fairly be said to have been the inherent risks of the particular hazardous activity under*

[16]1973 (4) SA 764 (A)

[17]Ibid at 778F - G

[18]Ibid 781B - F

consideration. Thereafter, the Court must proceed to make a factual finding upon the vital question as to whether or not the claimant must, despite his probable protestations to the contrary, have foreseen the particular risk which later eventuated and caused his injuries, and is accordingly to be held to have consented thereto. The foregoing appears to me to afford a practical method of dealing with what is admittedly a somewhat difficult problem, to be in general conformity with our decisions in so fas as they touch this point."

[54] Taking cue from the Vorster judgment, the test for the knowledge of risk by the plaintiff is twofold: first, there must be an objective assessment of the facts in order to ascertain the type of inherent risks that existed and secondly, a factual finding as to whether the plaintiff foresaw the actual risk that later ensued and caused his injuries. Despite the roads having been blockaded by the protestors when the plaintiff returned from work, there was no shooting or any form of violence taking place at that time including when the plaintiff walked to the tuckshop. There is no iota of evidence, in my view, that suggests that the plaintiff must have known and appreciated the risk and elected to encounter it.

It therefore follows that the defendant has further not established this defence of *volenti non fit injuria*.

[55] In as far as the defence of contributory negligence is concerned, I have already found that the defendant has not discharged the *onus* in establishing the defence of necessity. Establishing contributory negligence therefore becomes an exercise in futility, but for the sake of completeness, I comment briefly on the aspect. The defendant has not shown that the plaintiff acted unlawfully or even participated in the protest action. The shooting incident did not take place on the main road where the protest action took place but in a residential area. I found that the police were negligent by firing rubber bullets in the direction of the protestors who were in a built-up area. I also commented on the conduct of Yono and Moitsi in the exercise of their ill-fated discretion as well as

the failure to account for the used ammunition and to pinpoint who was placed in possession of which firearm and ammunition as well as the failure by the defendant's witnesses to testify. What is also concerning is the lack of communication, the failure to reconcile the records and lack of accountability pertaining to the occurrences on 21 April 2016. The absence of evidence-based video-material is also a grave dereliction of duty by the police. All these factors point towards the way in which the police conducted themselves particularly on the crucial day of 21 April 2016. These leave no room for contributory negligence on the part of the plaintiff. It will be unjust to regard the plaintiff as a joint wrongdoer under the circumstances.

[56] I am satisfied that the defendant has not discharged the *onus* of proving that the police action in which the plaintiff was injured on 21 April 2016 in the vicinity of Jacksonville, Roodepan, was lawful. In the premise the defendant should be held liable for 100% of the proven damages suffered by the plaintiff.

[57] In the result, the following order is made:

1. Defendant is liable to pay 100% of plaintiff's proven damages.

2. Defendant shall pay the agreed or taxed party and party costs of plaintiff.

M.C. MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

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