



HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 12327/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **Yes**

Date: **10th July 2020** Signature: _____

In the matter between:

DAWETI LOYISO MOSES

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGEMENT

YENDE, AJ:

Introduction

[1] On the 3rd March 2020 at 10h21 the Counsel for both Plaintiff and Defendant came to Judges Chambers for an introduction. Counsel for Plaintiff Mr. C. Sihlali stated that this is a claim against the Minister of Police for the Plaintiff who was shot while walking from her mother's home when there were people who were trying to occupy a church land from Khutsong in Carletonville. According to Mr. Sihlali the Plaintiff was shot at and lost eye-sight on the right side of the eye. This is what the dispute is about and the Defendant

disputes this however, the Defendant's Counsel is of the view that they must deal first with the merits of the matter. If the merits are in favour of the Plaintiff, then the Defendant will make an offer on the quantum.

[2] Counsel for the Defendant Mr.C. Mqushulu confirmed this. Both counsel agreed to the separation of merits from quantum, that it will be in their great pleasure that the matter should proceed on merits. Counsel for the Plaintiff indicated that he is read to proceed and that he has only one witness, the complainant who was at the court room. Counsel for the Defendant also confirmed that he has three police witnesses to call. The parties agreed to a separation of merits and quantum in terms of Rule 33(4) of the uniform Rules of Court.

[3] The Plaintiff, a 40 year- 10 months old male, sues the Defendant for damages arising out of an incident in which he sustained bodily injury that occurred during the evening on the 13th July 2013 in Khutsong, near Ndlebende Church wherein it is alleged that the members of the South African Police Services acting in the course and scope of their employment negligently fired rubber bullets at the Plaintiff and/or alternatively at the direction of the Plaintiff resulting in an injury to his right –eye.

[4] The Plaintiff testified and called Ms. Keneilwe Matlou his sister-in law as his witness and the Defendant called as its witness Warrant Officer Haleboni Mashego a member of the Public Order Policing Service(POPS) who attending the scene at Ndlebende Church.

[5] It is necessary that I should give a succinct relevant summary of the evidence ad merits of the matter. The back ground facts are simple and remained disputed at the conclusion of the trial.

[6] **The Plaintiff, Mr. Daweti** testified that on the 13th of July (the year which he could not remember at first) my emphasis it was on a Saturday afternoon, having knocked off from his work place he went to his home that is situated at number 4989 extension 5 in Khutsong, Caltonville. He arrived at his home took his wife and his children and proceeded to his mother's house at Khayaletu settlement in Khutsong, Caltonville where his sister had a ceremony for her child.

[7] Between 18h00 to 19h00 hours, Plaintiff testified that he decided to accompany his sister in-law to her home as she was not staying very far from where the ceremony was held. According to the Plaintiff they walked on foot with the children and his sister in-law. They walked pass the Police. These Police were inside the church premises as well as the members of the community .He never pay much attention to some of these people who were outside the church premises. They continued to walk pass the church premises until they reached his sister in –law place.

[8]On the way back from accompanying his sister in-law the Plaintiff cannot say what happened. The Plaintiff testified that he heard gunshots, people were ducking and running away .He was struck by a bullet on his right eye and he fell on the ground as he was bleeding. At that time his sister in-law came to the scene she stated crying that he has been shot.

[9]The Plaintiff testified that his sister in-law took him to the police who were congregated at the church premises whereupon she told the police that they had shot at the Plaintiff who was not part of the striking community members. The Plaintiff was adamant that his sister in-law is the one that came to his rescue and went together with him to talk to the police about them shooting him on his right eye while he was not part of the striking community members. The Plaintiff further testified that he became aware of why there were police at the church premises only after he was discharged from the Hospital. According to the Plaintiff there was a fight and/or strike by the members of the community over the land on which the Ndebele church is situated.

[10]The Plaintiff further testified that at the scene where he was injured he never spoke to his sister in-law as she was crying and he was bleeding profusely. Further that his wife and his siblings came to the scene after they heard that he was injured. According to the Plaintiff the police told his sister in -law that they cannot transport him to the hospital on the police van since they are not allowed to do so but that they will summon an ambulance to come and transport him to the hospital. After some time the Police told him that the ambulance cannot come to the township because the community members were stoning the ambulances. When asked by his Counsel how he got the medical help, the Plaintiff responded to the effect that his brother in -law took him to the local Clinic on his private car.

[11]The Plaintiff further testified that upon arrival at the local Clinic he was checked and transported in an ambulance to Sybrand Hospital the same night. He was treated overnight and the next morning he was transported by an ambulance to St John's hospital it was on Sunday. While at St John's hospital his right eye was removed as he was told that he had internal bleeding on the right -eye.

[12]The Plaintiff testified that since his right eye has been removed he experiences challenges in that he could not perform his work as he used to do. He was employed as a blockman cutting meat at the Oberholzer Slaghuis prior to him losing his right eye. He stated that he had been employed at the same Slaghuis for past 5 -6 years. He returned at his place of employment wherein he worked for approximately 3 -4 months and he was later demoted and dismissed after he cut himself with the meat cutting machine. He further testified that as a result of losing his eye his

temperament has changed in that he get angry too quickly and people are tormenting him about his right eye. The Plaintiff also testified that after he was injured his, he never looked for any employment according to him he could not be employed being a one eyed person.

[13]The Plaintiff was subjected to cross-examination by Mr. Mshuqulu. Mr. Mshuqulu began his cross –examination with reference to the joint Minutes reports of the Experts which was compiled on the 23rd September 2019. It was put to the Plaintiff that during his evidence in chief he testified that after he was injured he returned to his work place wherein he worked for about 3-4 months and then he was retrenched yet in the Joint Minutes Report by the two Occupational Therapist it is recorded that he returned to his workplace and worked up until the 26th September 2019 which is about 6 years after his injury on his right eye. The Plaintiff was could not explain this discrepancy and maintained that he just worked for about 3 to 4 months thereafter he resigned after he cut himself. He was asked whether did he completely stopped working at the Butcher after he was injured to which, Plaintiff responded to the effect that it had been nine (9) years since he stopped working from the Butcher. He maintained that he does not know where the Experts got his Employment Record and activities after his resignation from Mr. Dawie's Butcher.

[14]The Counsel for the Defendant also put to the Plaintiff that the Joint Minutes Report of both the Experts refer to his income while he was gainfully employed at a Butcher before and after his injury to have been in the region of R890.00 to R 940.00 per week, to this the Plaintiff was very much upset and testified that these amount are completely incorrect and that he has a pays lip which can confirm the wages he earned from the Butchery. He testified that the correct amount of wages he earned was in the region of R370.00 per week and that he does not agree with these figures from the Experts. He testified further that both the Experts had consulted with him regarding his employment record after he was injured on his right –eye.

[15]It was further put to the Plaintiff that he went to Khutsong Police Station to report the incident on the 21st July 2013 to which he confirmed that he did go to report the matter to the Police although at first the Police had refused to take his case until his mother came along to tell the police that they must not refuse to take the Plaintiff case since he was injured. According to the Plaintiff he remembers this incident as his head was still swollen. The Plaintiff's statement was put to him to comments on contradictions contained therein, to which the plaintiff responded that his statement was not made freely and voluntarily, that the Police had initially refused to take it. The Plaintiff proceeded to deny the contents of his statement and averred that what is contained in his statement is not what he told the

Police about the incident. He further stated that his statement was never read back to him and that all he did was just to append his signature on the statement.

[16] It was put to the Plaintiff as to which version must be accepted he replied that the correct version is the one he made at court under oath and not his written statement under oath taken at the Khutsong Police station. It was further put to the Plaintiff that in his statement he mentioned that the incident took place at 20h00, to which he denied. In his statement he made no mention of his sister in-law telling the police that they had shot the Plaintiff, instead on his written statement he make mention of his friend who came to his aid and that he told the police that he was shot at. The Plaintiff was also refereed to paragraph 4 of his written statement where he stated that "in fact I was standing near Hlanganani Tavern and I do not know what happened" to which the plaintiff denied and averred that he was not standing but walking along Hlanganani Tavern.

[17]The Plaintiff testified that when he arrived at his mother's place he drunk sorghum beer with other people who were present in a standard calabash container but he never got drunk. He testified that he had decided to accompany his sister in-law Keneilwe to her place and that they walked on foot pass the Ndlebende church until they reached Keneilwe place. The Plaintiff also testified that Ndlebende church was separated by the street opposite Hlanganani Tavern. He testified that he was walking on the pavement next to Hlanganani Tavern opposite the Ndlebende church when he was shot by the Police. He denied his written statement in as much as it referred to him being shot while standing next to Hlanganani Tavern.

[18]During cross-examination it was put to the Plaintiff that in his written statement he mentioned that him and his friend after he was shot they run to the Church premises where he told the Police that they shot him yet during his evidence in chief he testified that it was his sister in-law who took him to the police and told them that they had shot the Plaintiff, to which the Plaintiff responded that he never make such a statement to the police. The Plaintiff denied that he told the Police that he was shot by them instead he maintained that it was his sister in-law who told them so. The Plaintiff also testified that the visibility was good as there apollo light was shining next to the church premises and he could see the Police inside the church premises. It was put to the Plaintiff that the Police were inside the church premises when they fired the rubber bullet to the striking community members who were also on the church premised causing chaos, that it was impossible that he could have been struck by the rubber bullet while on the pavement of Hlanganani tavern far away from the church, to which the Plaintiff denied.

[19] It was put to the Plaintiff that according to the Police no member of the community came to them and claims that he was shot by the police and that no member of the community was shot by the police at or near Ndlebende church, to which the Plaintiff denied and maintained that he was shot at by the police. It was further put to the Plaintiff that how does he knows that he was shot by a rubber bullet, to which the plaintiff testified that he felt it when it struck him and this was confirmed by the doctor at the hospital. It was put to the plaintiff that he cannot be emphatic that he was struck by the rubber bullet since any object could have struck him, to which the plaintiff averred that the rubber bullet injured him and cracked his eye.

[20] The Counsel for the Defendant requested an inspection *in loco* for purposes of exacting:

[20.1] the precise location of the Ndlebende church in relation to where the police where on the church premises and the striking community members;

[20.2] the precise locality where the Plaintiff was injured while walking and/or standing on the pavement next to Hlanganani Tavern.

[20.3] both counsel for the Plaintiff and for the Defendant never agreed with regard to the pointing out by either of their parties.

[20.4] The Court's observation about the locality of Ndlebende church was consistent with the testimony of the Plaintiff. That the church is bordering between two roads on the Northerly side as well as on the Southerly side and the entrance to the church is by the Northerly side. On the southerly side of Ndlebende church there is a tar road which can carry two motor vehicles travelling in opposite direction. That immediately after the road there is a road reserve/pavement and houses where Hlanganani Tavern is also situated just opposite the church. The boundary wall of the Ndlebende church is a wire mesh thus one can easily see people inside the Church yard.

[21] It is worth mentioning that after the Court together with both counsel for Plaintiff and the Defendant had conducted the inspection *in loco* the matter could not proceed since Mr. Mqushulu withdrew from the matter and Mr. L Tyatya replaced him and proceeded with the matter.

[22] During cross examination the Plaintiff confirms that when he was shot at, he was walking pass Hlanganani Tavern opposite the Ndlebende church facing forward. When he felt a rubber bullet hitting him on his right -eye. He further maintained that he was not part of the community members who were striking against the Ndlebende church. He denied the contents of his statement to the police and maintained that the court should accept his version of events as presented by him at court under oath.

[23] **Ms. Keneilwe Matlou**, the sister -in-law of the Plaintiff testified under oath on behalf of the Plaintiff. According to Ms. Matlou she was with the plaintiff at his mother's place where there was a party. She testified that at about 20h00 hours she was accompanied by the Plaintiff to her place with the children. She testified that her place is within a walking distance from the Plaintiff's home. According to her upon arriving at her place the Plaintiff returned back to his mother's place.

[24] She testified that she heard people running to her street screaming that the Plaintiff has been shot. She proceeded to go and look for the Plaintiff. She found the plaintiff sitting on the ground bleeding on the eye. She walked with the Plaintiff to the Police inside Ndlebende church where she told them that they shot the Plaintiff and he was not part of the community members who were tiyo-toying. She testified that the Police told them that they are not allowed to transport people to Hospital with a Police van and that they will call an ambulance for them.

[24] She testified further that when they returned for the second time at Ndlebende church at about 22h00 the Police told them that the ambulance does not want to come to the scene as the paramedics fear that they will be stoned by the striking community members. When asked to explain why they had to come to the church for the second time, she responded that after being told by the Police that they will call an ambulance, they left to the Plaintiff's home to wait for an ambulance for some time which did not come and that is when they decided to return to Ndlebende Church. When asked how did the Plaintiff got help, she testified that the Plaintiff's brother in law decided to transport the Plaintiff to the clinic in the location and later he was transported by an ambulance to Sybrand Hospital.

[25] During cross examination Ms. Matlou confirmed that the people who had gathered by the church were many although she did not count them and that they were toyi-toying for the ground on which the church was located because they wanted to build a park on that land. She testified that the community members were having a standoff with the church people. She testified further that when they walk passed the church no stones were being thrown but the people were singing. She confirmed the description of the locality of the church as described by the Plaintiff. She further testified that the crowds of people were standing nearer Hlanganani Tavern. She confirmed that she was not present when the Plaintiff was not injured nor can tell what hit him on the eye. She confirmed that she does not know the people who screamed that the plaintiff has been shot.

[26] She further testified that the visibility was not good where she found the plaintiff although she confirmed that there was a light from the church that was shining onto the crowd. She was asked why did they not take the Plaintiff to the clinic when the ambulance did not arrive at first to which she responded that she wanted the ambulance to transport him to the clinic in spite of the fact that the Plaintiff was bleeding. It was put to her that the crowd that was surrounded the church rowdy, throwing stone and burnt the church to which she responded that she did not see this.

[27] It was further put to her that according to the Police they never shot any person on the night in question, to which she responded that the Police shot the Plaintiff. It was further put to her that according to the Police no member of the community came to report to them that he or she was shot by the Police at Ndlebende church, to which she responded she does not know. Ms. Keneilwe confirmed that she never made a statement to the police about the injury of the Plaintiff. According to her she was not aware that she had to do so. When asked who told her to come to court, she responded that the Plaintiff had asked her to come and give evidence to court that she took her to the police on the day of his injury.

The Plaintiff closed its case.

[28] The Defendant presented its case and called as a witness Warrant Officer Haleboni Mashego. He testified as follows: he is a member of the South African Police Service attached to the Public Order Police Service stationed at Booyens Police Station. He joined the Police on the 25 October 1988 and currently he holds a rank of a Warrant Officer. He reported for duty on the 13th July 2013 at 17h45 and attended a Police parade until 18h30. He then drove to Booyens in a company of other three police officers. After 30 minutes they received a radio complaint from Khutsong Township that the community was attacking the Ndlebende church.

[29] They proceeded to Ndlebende church in Khutsong Township where they found groups of people about 300 in number who were next to Ndlebende church. They got into the church premise and spoke to the Pastor who made a report to them that the community members were attacking the church because they wanted to build a community park on the land on which the church was located.

[30] They were pointed two cars inside the church yard that the community members damaged with stones. W/O Mashego testified that while inside the church yard he saw the crowd of people burning the makeshift tent of the church which was next to the street by the entrance to the church premises. There was also a group of people who were on the side of the street by the entrance to the church where the tent got burned. The church congregants helped to put down the fire together with the Police.

They approached this crowd to try to intervene and speak to the community members instead the crowd pelted the police with stones and objects and he threw a teargas which was the only thing on his hands and other Police

fired rubber bullets at the crowd that was attacking the Ndlebende church. According to W/O Mashego this was done in order to calm the situation and disperse the crowd.

[31]When asked if did any member of the community came to report that he was injured .He responded that there was none and testified that if any person came to report that he was injured by the Police, they would have called an Ambulance for that person. They will further obtain the particulars of that person including that of the driver of the ambulance. Thereafter they will escort the ambulance to the hospital and guard that person until he is discharged. That person will later be taken to prison. He was adamant that no one was injured by the Police nor came to report to the Police at Ndlebende church that he was injured by the Police.

[32]According to W/O Mashego he has been using the rubber bullet gun since 1999. He attended Training in Thabazimbi where he was trained how to handle and use the rubber bullet gun. This is a yearly training where the Police attend a shooting range and taught how to use the shotgun. The Police Officer will be disqualified if he does not qualify and pass the training and when disqualified he is not allowed to use the shotgun. He further testified that the Police are trained that when firing a rubber bullet gun they must shoot the target from the lower body downwards and this is done to avoid injuring the target on the upper body. It was put to W/O Mashego that the Plaintiff has testified that he was shot and injured by the police and that he was brought to the church premises where the Police promised to call an ambulance for him and he waited until 22h00 for an ambulance which never came, to which he responded that he bears no knowledge of the Plaintiff and/or such a person. According to him while at the scene no person came to report to the Police that he has been shot and injured by the police.

[33]W/O Mashego further testified that they arrived at Ndlebende church at 21h40 (pm) and at about 00h30 (am) they drove to a local garage to buy cold drinks and returned to continue to patrol the area until 04h30 (am) when they left Khutsong. He testified that while the police were at Ndlebende church no community member was shot at and injured by the police. He further testified that no community member came to Ndlebende church to report to the Police that he was shot at and injured by the Police. He testified further that W/O Ramalepo who was their crew member on the 13th July 2013 had opened a docket about the complaint at Ndlebende church and made a statement about what happened at the scene and is now unfortunately deceased. The Counsel for the Defendant requested that the said Police docket be admitted as evidence in terms of Section 3 of the Law of Evidence Act 45 of 1988 and same was admitted in terms of Section 3(c) of Act 45 of 1988.

[34]During cross examination W/O Mashego maintained that when they arrived at Ndlebende church he saw a Police van which was parked outside the

church and he did not see other Police Officers and confirmed that the groups of people who were by the church were approximately 300 in number. It was put to W/O Mashego that there was a gate on the southerly side of the church opposite Hlanganani tavern to, which W/O Mashego responded that he did not see that gate and confirmed that the only gate that they use was the one on the northerly side of the church which they used when entering the church premises.

[35] It was further put to W/O Mashego that there was a crowd of people on the southerly side of the church opposite Hlanganani tavern, to which he responded that on the southerly side of the church there were no crowds of people and that they never went to the people at Hlanganani tavern as that was a private place. W/O Mashego was adamant that the crowd that they were managing was on the street leading to the grave side and not on the side opposite Hlanganani tavern.

[36] It was put further to W/O Mashego whether he knows that any person was injured in that incident or to his knowledge no one came to report that he was injured, to which he responded that nobody came to the police to report that he was injured that is why they took time before they left the scene so if there is somebody injured then they will call an ambulance. W/O Mashego further averred that they never even received a report from the Police Station that they had injured someone from the incident at Ndlebende church on that day.

[37] It was further put to W/O Mashego that is it possible that the Plaintiff was shot and injured prior to them having arrived at the Ndlebende church, to which he responded that while they were at Ndlebende church no member of the community came to the police at the church to report that he was injured by the Police. It was further put to W/O Mashego that the pointing out during the inspection *in loco* in relation to where the Plaintiff was shot and injured points to the fact that the police had fired in the direction of the Plaintiff. To which he denied and averred that the crowd was never at the direction where the Plaintiff alleges he was shot.

The defendant closed its case.

Analysis of evidence and the Application of the law

[38] What must therefore be considered are the two versions of the Plaintiff Mr. Daweti on the one hand and the version of W/O Mashego on behalf of the Defendant the Minister of Police on the other, which versions are mutually destructive. It is trite that in the civil proceedings of this nature the Plaintiff bears the onus to prove its case on the preponderance of probabilities in order to succeed with his claim.

[39] The correct method of evaluation of the mutually destructive factual disputes has been well enunciated as follows in Stellenbosch Farmers Winery Group Ltd. And Another v Martell & Cie SA and Others (427/01) [2002] ZASCA 98 (6 September 2002) at par [5]:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows; To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness- box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf ,or with established fact or with his own extracurial statements or actions ,(v) the probability or improbability of particular aspect of his version ,(vi) the caliber and cogency of his performance compared to that of the other witnesses testifying about the same incident or events.

As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessments of (a), (b) and (c) the court will then, as a final step, determine whether the party's burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail".

[40] This matter could not be settled solely because of the two versions that are mutually and diametrically destructive hence the trial adjudication. From the Pleadings it is obvious that the Plaintiff issued summons on the 31st March 2015, claiming damages against the Minister of Police. In the Pleadings the Plaintiff pleaded that on or about the 13th July 2013, and at or near an area known as Khayaletu Township in Khutsong, Carletonville. He was wrongfully and unlawfully assaulted by a member of the South African Police Services whose identity is unknown to him.

[40.1] That he was shot in the right eye with a rubber bullet whilst he was walking in the area,

[40.2] That the rubber bullet was fired by a member of the South African Police Service who was at all times material thereto, the servant of the Defendant ,acting within the course and scope of their employment .

[40.3] The Defendant deny shooting the Plaintiff or any other person on that day in question. The reason being that on the day in question no one was injured and no one was arrested for public violence.

- [41] It is common course that the on the 13th July 2013 there was an incident at Ndlebende church, in Khutsong Township which resulted in the Police from Booysen Public Order Policing Service being summoned to quell and calm the situation. The Plaintiff alleged that he was injured on his right eye as a result the eye was removed. This being as a result of being allegedly shot at with a rubber bullet by the Police during the standoff with the striking groups of about 300 people at Ndlebende church. The Plaintiff after 8 days of the incident and 4 days having been discharged from St John's Hospital he went to the Khutsong Police station to open a Police docket. At the Police station, Plaintiff alleged that the Police refuse to take down his statement and later his mother intervenes and it was taken.
- [42] Of cardinal importance is the following, when he gave his statement to the police on the 21st July 2013 under oath when the incident was still fresh in his mind he informs the police that ".... in fact I was standing near Hlanganani tavern when I was hit with a rubber bullet on my right eye..... my friend and myself then went to the side of the police....my friend was crying and I raised hands up and I approached the police and I informed them that I was shot on the eye by the police..".
- [43] During the trial in his evidence in chief the Plaintiff testified under oath that when he was shot at, he was walking pass Hlanganani tavern opposite the Ndlebende church facing forward. When he felt a rubber bullet hitting him on his right -eye. That his sister in-law came to his rescue and took him to Ndlebende church premises where she told the police that he was not part of the striking community members and they shot at him. When he was confronted with this contradiction between his statement and his evidence at court he was surprise as though he was seeing this for the first time. Instead he sought that his statement should be completely rejected in that it was not the correct version he gave to the police and same was never read back to him. He admitted that it was his signature that appeared on his written statement.
- [44] When dealing with the contradictions in the complainant's evidence the court in SvMkhohle 1990 (1) SACR 95 (A) at 98e-f stated that "the court must not reject a witness' evidence simply because he/she has self-contradicted. It should rather look at the number of such contradictions, their nature and importance. However, it cannot be overlooked that the complaint's evidence -in-chief differs materially with what she said during cross-examination". This contradiction is very much material to the Plaintiff's version as to how he got shot at by the police as he was walking pass Ndlebende church opposite Hlanganani tavern facing forward as oppose to his initial written statement that he was standing near Hlanganani tavern when he got shot.
- [45] The Plaintiff further contradicted his initial statement to the Police when he told the Police that he is the one who informed the them that he was shot on the eye, yet in his evidence in chief he testified that his sister in-law came to his rescue and took him to the police inside Ndlebende church and told the police that they had shot at the Plaintiff who was not part of the strike. This is also another material contradiction because it relates to

the first report about his injury to the police. On evaluation of contradictions and inconsistencies see also Sv Mafaladiso en Andere 2003 (1) SACR 583 (HHA) at 584h-j. It is very strange and concerning to this court that the Plaintiff would forget and/or contradict himself on what happened and/or he did eight (8) days from the incident and remembers the most pertinent events that happened seven (7) years ago. The extract of what transpired during cross-examination as quoted above is evidence to the above reasoning.

- [46] The Plaintiff when taken through his initial statement he avoided the questions by stating he does not remember and/or that the Police wrote their own version and that his statement was not made freely and voluntarily because according to him the Police refused to take down his statement .
- [47] It is further concerning to the court that at first the Plaintiff Counsel indicated that the Plaintiff was his only witness and later after the testimony of the Plaintiff the sister in-law of the Plaintiff was called to testify on his behalf. According to Ms. Matlou she is the one that made the report to the Police about the Plaintiff injury yet she never made a written statement to the about incident .She testified that she was asked by the Plaintiff to come give evidence about the incident on the 21st July 2013. She could not tell the court who informed her that the Plaintiff was shot by the police ,yet when she found the Plaintiff on the ground she took him to the police at Ndlebende church and told them that they have shot at the Plaintiff who was not part of the Striking community members .
- [48] In his evidence in chief the Plaintiff testified that he was injured between 18h00 to 19h00 hours ,his sister in law testified that it was around 20h00 hours when the Plaintiff accompanied her to her home. It was after the plaintiff was returning to his mother place that she heard people running down the street screaming that the Plaintiff was shot. According to Ms. Matlou when she took the Plaintiff to the police he was bleeding and the Police saw this and did nothing to help the Plaintiff, this is also strange. Further that they went to the Plaintiff's home while bleeding and return to the Police for the second time around 22h00 while the plaintiff was still bleeding when the Police informed them that the ambulance could not come for fearing to be stoned by the community members. It was then that they decided to transport the plaintiff to the local clinic in his sister's car. This I found to be improbable in light of the Mafaladiso en Andere decision mentioned *supra* because it simply mean that the Plaintiff had be bleeding from about 20h00 hours to 22h00 hours without any medical assistance.
- [49] As far as the evidence of W/O Mashego is concerned it is a fact that He is an experience Police officer with solid 28 years of experience in the Police force. He did not contradict himself. They were four in a Police Quantum-bus when they received a complaint from the Police radio to go to Ndlebende church in Khutsong, to quell the striking community crowd that sought to damage and burned down the church because they wanted to build a community park on the land on which the church was located.

- [50] W/O Mashego maintained throughout his testimony that the crowd was about 300 people who had gathered by the entrance of the Ndlebende church and others by the grave side. The crowd had been throwing stone and damaged two cars inside the church. While on the church premises the crowd burned the make shift tent of the church which was next the street by the entrance to the church premises. They approach this crowd to try to intervene and speak to the community members instead they pelted the Police with stones and objects and he threw a teargas which was the only thing on his hands and other police fired rubber bullets at the crowd that was attacking the Ndlebende church. According to W/o Mashego this was done in order to calm the situation and disperse the crowd. W/O Mashego was consistent and adamant that this crowd was never on the side opposite Hlanganani tavern.
- [51] He testified that the police never went by the side of Hlanganani tavern because the people there were minding their own business. His evidence is that he threw the tear gas to the crowd that was by the entrance of the church next to the mission house and the rubber bullets were fired to the direction of that crowd by his colleague.
- [52] When it was put to him by the Plaintiff's counsel that the Police fired in the direction of Hlanganani tavern and injured the Plaintiff on his eye. He vehemently denied this and averred that the Police never fired in that direction and that while at Ndlebende church nobody came to the Police to report that he was injured. He averred that they took time before they left the scene so that if there is somebody injured then they will call an ambulance. W/O Mashego further averred that they never even received a report from the Police Station that they had injured someone from the incident at Ndlebende church on that day.
- [53] I have referred to the testimony of W/O Mashego above but, what is pertinently clear from his testimony is that they arrived at Ndlebende church at about 21h40. They are the ones who quelled the crowd by throwing a tear gas and firing rubber bullets to the rowdy crowd. When contrasting same with the testimonies of both the Plaintiff and his sister in-law, the plaintiff was injured between 18h00 and 20h00. They went to Ndlebende church to report to the police that the Plaintiff was shot and returned at about 22h00 hours to enquire about an ambulance which did not arrive. It is very strange and improbable that W/O Mashego would not have noticed the Plaintiff in the company of his sister in law and siblings at Ndlebende church. In his testimony W/O Mashego testified that he does not know the Plaintiff and has never met him before, thus why would he have bias against him. The only logical probability is that both the Plaintiff and his sister in law were never at the Ndlebende church on that fateful night and the Plaintiff was never injured by the Police at Ndlebende church.
- [54] Concerning the locality of the Ndlebende church I have referred to same *supra*. It is the testimony of the Plaintiff that he was injured near Hlanganani tavern which is on the southerly side of Ndlebende church separated by a single carriage street which carries two vehicles travelling in opposite directions. According to his testimony he was walking facing

forward when he was injured on his right eye. There is no entrance on the southerly side of Ndlebende church and W/O Mashego testified that the rowdy crowd was on the entrance of the Ndlebende church on the Northerly side of the church. If the police were quelling a rowdy crowd with a tear gas and rubber bullets in the northerly side of the church it is improbable that the rubber bullet would hit someone walking on the Southerly side of the church facing the western direction.

[55] The court in National Employers General Insurance Limited v Jagers 1984 (4) SA 437(E) AT 440 D-G held that "it seems to me with respect ,that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rest. In a civil case, the onus is obviously not as heavy as in the criminal cases, but nevertheless where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not the court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of a credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff, then the court will accept his version as being probably true. If however ,the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case anymore than they do the Defendant's, the Plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false".

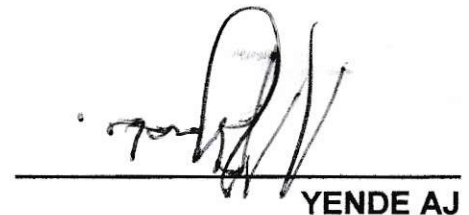
[56] Having referred to National Employers General Insurance Limited *supra* It is evident that the Supreme Court of Appeal in Stellenbosch Farmers Winery Group and Another mentioned *supra* has laid down exhaustive factors to be considered by the court when evaluation mutually and diametrically destructive testimony. In my view the Plaintiff's testimony in this case is rather against the Plaintiff than in his favour. There is no direct evidence that the Plaintiff was shot and injured by the Police. There is direct evidence that the rowdy crowd damaged two vehicles inside the church premises and burned down the make shift tent inside the church. When the Police approached this crowd to try to intervene and speak to the community members instead, they pelted the police with stones and

objects and the police threw a teargas and fired rubber bullets at the crowd that was attacking the Ndlebende church on the Northerly side of the church. I found that the evidence of both the Plaintiff Mr. Daweti and his sister in-law is contradictory and improbable. I further found that the Plaintiff's evidence is inconsistent with the totality of the testimony presented during the trial.

[57] I found Warrant Officer Mashego to be a credible and honest witness. His evidence having being approached with caution is the most logical and probable in the circumstances.

[58] Having regard to all the evidence presented and the heads of argument by both counsel for the Plaintiff and the counsel for the Defendant and the case law referred *supra*, I found that the Plaintiff has failed to discharge the onus of proving his claim on the preponderance of probabilities as the consequent I make the following order:

[59] The Plaintiff's claim is accordingly dismissed with costs.



**YENDE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

DATE OF HEARING: 3rd, 4th, 5th, 18th and 19th March 2020

JUDGMENT DELIVERED: 10th July 2020(electronically)

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