



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 20987/2017

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES/NO

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SIGNATURE

2022-03-30
DATE

In the matter between:

BALOYI WISANI JOHANNES

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

Delivered: This judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 30 March 2022.

JUDGMENT

PHAHLAMOHLAKA A.J

[1] The events of 23 October 2015 were preceded by an invitation to the students of higher learning institutions by the President of the Republic of South Africa, who wanted to address them at the Union Buildings about the fees. The end result was an unfortunate incident where the plaintiff, a student at Tshwane University of Technology (TUT), Soshanguve South campus at the time, was shot at on with a rubber bullet discharged from a shotgun and his left eye was damaged.

[2] As a result of the injuries he sustained the plaintiff is now suing the Minister of Police for damages arising from the actions of the members of the South African Police Services. The action as defended.

[3] At the commencement of the trial the counsel for both parties moved an application for separation of merits for liability from quantum in terms of Rule 33(4) of the uniform Rules of Court. The Application was granted and the trial proceeded only on liability.

[4] The following are either common cause or not dispute:

4.1 The plaintiff, Wisani Johannes Baloyi, was a student at Tshwane university of Technology of Soshanguve South campus, on 23 October 2015.

4.2 Like many other students the plaintiff responded to an invite by the President of the Republic of South Africa to gather at the Union Buildings where the President promised to address the students.

4.3 Around 16h00 or so on 23 October 2015 the plaintiff was shot in the eye with a rubber bullet by members of the South African Police Services at the Union Buildings, and those members were acting within the course and scope of their official duties.

4.4 The plaintiff sustained injuries to his left eye which was ultimately operated on and he is totally blind on the left eye.

[5] The court is called upon to determine whether the actions of the members of the South African Police Services were lawful or not. The defendant says the police acted out of necessity as the students were violent and therefore their actions were unlawful.

[6] The plaintiff's case is that at the time police fired shots at him he was running away and therefore it was not necessary for the police to shoot and they were not justified to do so.

[7] The factual matrix of the case are as follows:

7.1 The plaintiff testified that on 23 October 2015 at about 11h00 he and other students boarded a bus at TUT and they headed to the Union Buildings in Pretoria after it was announced that the President of the Republic of South Africa was going to address the Students of Institutions of Higher learning. They arrived at the Union Buildings around 12h00 and on their arrival they found other students at the Union Buildings. Some students were sitting under the trees whilst others were singing. The Plaintiff also sat under the tree awaiting for the president to address them, regarding the so called fees must fall which was a campaign by the students that the fees at the tertiary institutions must be scraped.

7.2 Later that afternoon it was announced that the President was no longer going to address the students. After it was announced that the President was not going to address the Students, they (students) became angry and they attempted to enter the Union Buildings by force. They were asking why the President was not coming to address them. Police then fired rubber bullets without any warning.

7.3 The Plaintiff realised there was chaos. He dented to run to where his bus was parked because he wanted to be safe. Whilst he was running towards the bus he felt being hit by a rubber bullet on his left eye as well as on his left chest. At that time he was facing the opposite direction of the stage where the police who were firing had been stationed. That he then became dizzy. He set down. He bowed his head to the front as he was sitting. Other students came to his rescue and took him to the ambulance. From there he was taken to Steve Biko Academic Hospital by ambulance and thereafter transferred to Kalafong Hospital where emergency surgery was performed on the left eye.

7.4 The defendant adduced the evidence of Lieutenant Colonel Marius Johannes Steenkamp who testified that he was the operational Commander in Public Order Policing in the South African Police Services. He has been a police officer for 34 years. A day before the 23rd of October 2015 he received information that the President of the Republic of South Africa will have a meeting with the Vice Chancellor of the tertiary institutions of South Africa. The information was further to the effect that the President would also address the Students after the meeting with the Vice Chancellors.

7.5 From around 09h00 students started arriving at the Union Buildings. Steenkamp was at the front of the Mobile stage overlooking the whole building. He could see some buses coming.

7.6 A fence had been erected as a barricade between the police and the students. From about 10h00 students started pushing the fence.

7.7 A big group of students arrived. Information was to the effect that they were students from TUT Pretoria West or Soshanguve Campus. Steenkamp says real problems started when this group arrived for they set mobile toilets and dustbins alight. He further testified that from about 10h00 students were throwing stones at the stage and towards where the police and members of the media were standing. He says there was no war then. He further says the mobile stage was damaged badly from about 11h00. The police reacted by erecting a barbed wire. He Steenkamp, was also hit with a brick on the side of his head. He says the students were too violent that the President was advised not to come and address them as the situation was volatile. Steenkamp further testifies that *"at some stage we could not control anymore... that is when I gave instruction to act. To use stungrenates. Students started dispersing. Whilst the students were running away from us, in the group that were those who threw stones at us. The students dispersed into the street. Some threw stones. I gave instructions to use rubber bullets"*

[8] It is the duty of the plaintiff and the onus rests on him to prove, on the balance of probabilities, that the actions of the members of the South African Police Services were unlawful.

[9] In as far as how the shooting incident occurred, the plaintiff is a single witness. The Plaintiff's evidence must therefore be reliable and trustworthy in order for this court to rule in his favour. The plaintiff's evidence could not be challenged by the defendant even during cross examination. What was put to the plaintiff was the steps the police took in dispersing the crowd on that day of the incident.

[10] Moreover, Steenkamp conceded that the police were not adequately prepared for that event. He told the court that there was only one water cannon in Gauteng. He said there were not enough police officers to man the crowd. He did not have a loudhailer to warn the crowd.

[11] The plaintiff's Counsel argues that the police were acted negligently and therefore their actions were unlawful.

[12] The defendant's Counsel argued that the police acted out of necessity because they were protecting themselves, property as well as the students themselves. Counsel referred me to the case of **Chetty v Minister of Police**¹ which is clearly distinguishable to this case. The court in Chetty clearly says "*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.*" I am of the view tht the fcts of this matter are distinguishable to Chetty because, as I have already said earlier, the police were not adequately prepared and therefore they were overwhelmed by the situation.

[12] Steenkamp testified that the students were violent from as early as 11h00 or so but he so no necessity to act. He says students were throwing stones at the police and a mobile stage was also damaged, still he saw no need to act. He says he was also hit with a stone thrown at him by one of the students, and still he did not act.

[13] I am of the view that Steenkamp's evidence is not only highly improbable but also patently ridiculous. When the students according to him posed a real danger he did not find it necessary to act but only acted when the students were running away after he gave instructions for police to discharge stungrenates.

[14].I find that at the time Steenkamp ordered the shooting there could not have been reasonable grounds for thinking was any danger, albeit imminent, to either persons or property because as the students were running away they could not possibly pose any danger.

[15] In **Kruger v Coetzee**² it was held that "*culpa* arises, for the purposes of liability, only if *diligens paterfamilias* in the position of the defendant not only would have foreseen the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, but would also have taken reasonable steps to guard against such occurrence, and if the defendant failed to take such steps."

¹ 1976 (2) SA 450 (N) at 452F-453A

² 1966 (2) SA 428 (A)

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[17] The case of **Mandhlaami v Minister of Police**³ is also distinguishable to this one. The court in Mandhlaami correctly held that it was necessary for the police to use rubber bullets and stungrenates against the large number of farm workers who had damaged the N1 freeway, looted shops, caused traffic congestion and were very violent (they threw a hail of stones at police).

[18] Clearly the plaintiff's version is more probable and there is no other version to gainsay it. In fact the defendant does not have a version other than to clutch at straws.

[19] The defendant's counsel argues that the plaintiff was not supposed to be there although he responded to the invitation by the President of the Republic.

[20] I am of the view that at the time Steenkamp gave orders for the police to use rubber bullets danger had already been averted. At that time the students were running away and even if one were to accept that some were throwing stones, these were further away from where they initially were.

[21] I am satisfied that the police acted unlawfully by the shooting at the plaintiff and they had no justification to do so. It was not necessary for them to shoot at students who were running away when they initially failed to act when they were under attack.

[22] In the premises I find that the plaintiff should be successful.

[23] Consequently I made the following order:

23.1 The defendant is ordered to pay 100% of the plaintiff's proven or agreed damages;

23.2 The defendant is ordered to pay costs including costs of two counsel.

K F PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

³ (7279/2013) [2017] ZAWHC 33(29 March 2017)

JUDGMENT RESERVED ON: 20 JANUARY 2022

DELIVERED ON: 30 MARCH 2022

COUNSEL FOR PLAINTIFF: ADV D M KEKANA AND M RAKGOALE

INSTRUCTED BY: CHAVALALA ATTORNEYS

COUNSEL FOR DEFENDANT: ADV T MADILENG

INSTRUCTED BY: STATE ATTORNEY