



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

REPORTABLE

CASE NO: 7279/2013

In the matter between:

PASSMORE MANDHLAAMI

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT DELIVERED ON 29 MARCH 2017

GAMBLE, J:

INTRODUCTION

[1] The Hex River Valley is known far and wide for its picturesque beauty - there is hardly a calendar or tourist guide promoting South Africa that does not feature a photograph of this idyllic rural landscape. The area is known for its fruit production, particularly its export grape farms, which traditionally employ numbers of seasonal workers to tend the vineyards in preparation for, and during, the annual harvest.

[2] The plaintiff, Mr. Passmore Mandhlaami, is a Zimbabwean national who headed south in 2011 in search of a better life. During 2012 he was employed as a seasonal worker on a fruit farm in the Elgin district and in the spring of that year, on the advice of a friend, he moved to the Hex River Valley where he took up employment on a farm known as *Goedehoop* where he worked under the supervision of Mr. Dawid Louw, the farm manager. The plaintiff lived in a backyard dwelling in the township of De Doorns East adjacent to the village of that name, and commuted to his place of employment on a daily basis utilising transport provided by his employer.

[3] Early in November 2012 there was a concerted period of strike action amongst farm workers in the Hex River Valley. The apparent peace and tranquility which customarily pervades the area was shattered when the strike turned ugly: there was widespread violence and destruction of property which necessitated the intervention of the police over a number of days. Early in the evening of 7 November 2012 the plaintiff sustained a gunshot injury to his left eye and as a consequence thereof the eye was surgically eviscerated and replaced with a prosthesis. It is common cause that the plaintiff's injury was caused by a rubber bullet fired by a member of the South African Police Services ("SAPS"). In the result, the plaintiff claims damages from the defendant as a consequence of the injuries sustained on that day.

[4] At the commencement of proceedings the court was informed that the parties sought only a determination on the merits and that all issues relating to quantum would stand over for later determination. During the hearing the plaintiff was represented by Adv W.S.Coughlan and the defendant by Adv P.A.Botha and

N.Mayosi. The court is indebted to counsel for their detailed heads of argument which have assisted in the preparation of this judgment.

SETTING THE SCENE

[5] Before detailing the events which led up to the shooting of the plaintiff, some geographical and historical detail is necessary. The Hex River Valley (for the sake of convenience “the Valley”) lies adjacent to, and mostly to the north of, the N1 highway which connects the Western Cape with the hinterland. It is hemmed in on all sides by towering mountain ranges and is traversed by the Hex River. Generally speaking, it may be said that the Valley lies in a terrestrial plain from West to East. Beyond the Western entrance to the Valley lies the town of Worcester and at the eastern end lies the town of De Doorns¹. Beyond De Doorns the N1 snakes its way up a steep mountain pass which transports all manner of road traffic through to the Karoo and beyond.

[6] Along the floor of the Valley lie various farming communities at places such as De Wet, Sandhills and Orchard where, in addition to farms, there are schools, shops, wineries and local residential areas. As the N1 bypasses De Doorns, the town lies to the north of the highway. To the south of the N1 at that point is a large informal settlement known as “*Stofland*”². Many of the seasonal workers employed in the Valley reside in Stofland and make their way to the village and the farms beyond, crossing the N1 by way of a vehicle overpass.

¹ According to Google Maps, some 32 km away.

² “*Dustbowl*” would be a fair translation.

[7] Adjacent to the Hex River is the main railway line which connects Cape Town with Johannesburg. It permits the conveyance of goods and passengers, a small number of who may be fortunate to travel on the iconic luxury Blue Train which travels between those cities. Trains leaving De Doorns for the North are bound to traverse a series of long tunnels, eventually emerging on the expansive plains of the Great Karoo beyond the Hex River Pass. The incident in which the plaintiff was injured occurred in the proximity of that railway line, close to the local station and one such tunnel.

[8] The 2012 farm workers' strike was a much publicised event in the local print and electronic media, as well as on television. It was remembered by many because it was the first of its kind in that area, and because it was particularly violent and destructive. Indeed, one of the police officers who testified on behalf of the defendant, a warrant officer with more than 20 years' experience in public order policing, told the court that the reason he so clearly remembered the events about which he testified was because this was one of the most violent strikes he had ever policed. Photographic and video evidence placed before the court demonstrated how buildings had been burnt or vandalised, how vineyards had been set alight and public property had been damaged. The level of anger and belligerence amongst the protesting strikers is also apparent from that evidence.

[9] One of the most alarming acts of vandalism viewed by the court was a trench which had been dug across the road surface of the N1 highway in the immediate vicinity of the bridge at Stofland. As a consequence, the highway was closed for a number of days and vehicles travelling to the North were required to

leave the highway to the west of De Doorns and travel along a local route through the centre of the village. Not only did this cause traffic congestion, but it rendered such vehicles liable to specific attacks along a narrowed stretch of road. Video footage also demonstrated how the railway line to the North was compromised and rail traffic brought to a standstill.

[10] In short, the events of early November 2012 in the Valley effectively isolated large parts of the Western Cape from the rest of the country. Access to the interior of the country could only be achieved through circuitous routes, whether by road or rail, with delays and concomitant cost excesses on all fronts. It was understandable, therefore, that a large contingent of police officers attached to the Public Order Policing Unit (“POP”), the K9 Unit from Worcester and surrounds, and the local police stations hastened to the area in an attempt to restore calm, protect property and to allow normal road and rail traffic to eventually resume.

THE EVENTS OF WEDNESDAY 7 NOVEMBER 2012

[11] Much of what occurred during the time when the plaintiff sustained his injury, as well as events which preceded this episode on that day were captured on video by a police video team. The video footage was placed before the court by agreement and subsequently the defendant handed up a narrative/description of that video material. The original video footage contains audio content as well as contemporaneous commentary from the videographer and it is therefore not necessary to go into the footage in any great detail: it is a matter of evidence on record.

[12] The police evidence was to the effect that earlier in the day a large gathering of striking workers and other interested parties took place at a sports ground in De Doorns East which is located roughly between the railway line and Stofland. When the meeting dispersed, a crowd of people moved in a northerly direction through De Doorns East towards the railway line, while others took to the N1 highway. The evidence of the local police chief, Lt Col Kriel, was to the effect that the railway line effectively divides the commercial centre of De Doorns from the residential areas to the south. He testified that there had been attacks the previous day on certain shops in the commercial centre and the police feared that this might occur again on the Wednesday. Not only were the police concerned about arson and the looting of such businesses, but there was a real threat that the only road capable of carrying traffic through the village to the North might be blockaded.

[13] Reinforcements were called in from areas to the west (Sandhills and Orchard) and at around 18h30 two bulky police armoured troop carriers (known as “*Nyala's*”) were on the scene at the southern end of Station Street, close to the railway line. Also present were several marked 4x4 police vans attached to the K9 (or Dog) Unit from Worcester and ordinary patrol vans from the local police station. Close to that point in Station Street there is a steel footbridge over the railway line which affords pedestrian access from De Doorns East to Station Street and the businesses beyond. Due to the absence of adequate fencing along the railway line itself, pedestrian access to Station Street could also be obtained by crossing the railway line in the direction of the commercial area. In the immediate vicinity of the footbridge, on Station Street, there was the “*Matroosberg Liquor Store*” as well as some private dwellings.

[14] In the video footage of events on and around the pedestrian bridge (commencing at approximately 18h40 on Wednesday 7 November 2012), one sees a number of police vehicles arriving with the customary haste and enthusiasm and the immediate deployment of armed policemen clad in riot gear and protective clothing. Their arrival is immediately greeted by a hail of stones thrown mostly by young men then on the northern side of the railway line in the vicinity of the stairs to the footbridge. The police then take up a position in an open space to the left of the footbridge (as one views the scene) and on the northern (or village) side of the railway line, in an attempt, mainly, to prevent any interference with pedestrian traffic over the footbridge. On the other side of the railway line one sees a large crowd of unruly protesters advancing and throwing stones and similar objects across the railway line in the general direction of the police. On the audio content of the video one can regularly hear the “*ping*” of stones striking the metal of the footbridge and the railway tracks.

[15] As the protesters advance some of the armed police officers move towards the railway line and ascend the footbridge, while others move down a slight embankment and cross over the tracks. In the process the police discharge their shotguns in the general direction of the crowd. On the southern side of the railway line, where the protesters are gathered, one sees in the distance houses to the right (the west) of a sizeable open space, which for the sake of convenience I shall call “the public space”. A few blue gum trees are scattered around that public space. Approximately 50 m or so to the south of the railway line, there is an electrical substation, located on the public space and enclosed with barbed wire.

[16] The evidence of the police was that, in addition to keeping the footbridge open for pedestrians, they were concerned about the protesters causing damage to the substation and so they sought to protect it from attack. To the left of the substation, and beyond it, the police witnesses pointed out a crèche and said they were concerned that it too might be attacked and vandalised. The crèche fronts onto Malva Street which lies on the southern perimeter of the public space.

[17] The video footage recorded in the vicinity of the footbridge covers a period of about an hour and from time to time the videographer changes position but always remains on the northern side of the railway line. The images clearly depict waves of protesters advancing towards the railway line, throwing stones (and later some petrol bombs) and then retreating as the police discharge their shotguns in the general direction of the protesters and the public space. There is an ebb and flow of activity as the protesters advance and retreat in response to the advance and retreat of the police towards them. All the while, stones and other objects are seen to be thrown in the direction of the police and can be heard striking the metal objects, as referred to earlier.

[18] Several of the police officers who were deployed in the vicinity of the footbridge gave evidence in support of the activities which can be seen on the video. I do not deem it necessary to repeat their evidence verbatim since there was no particular issue drawn from the side of the plaintiff in regard thereto. I shall touch on limited aspects thereof later.

THE PLAINTIFF'S EVIDENCE

[19] The plaintiff told the court that he was not a member of any trade union and appeared to wish to distance himself from the cause of the strikers. He explained that he customarily went to work using transport provided by his employer which collected him and his fellow workers in the village. During the strike, said the plaintiff, arrangements were made for the farmworkers on *Goedehoop* to be collected outside the local police station to ensure their safety. The plaintiff said that he did not go to work on the first day of the strike as there were people cruising around the township in a car warning workers through a loudhailer that people should refrain from going to work or face the consequences if they did so. That was on Thursday 1 November 2012.

[20] The plaintiff testified that he did not go to work on Monday 5 November 2012 either: the strike was on-going and his landlady had cautioned him against doing so. The plaintiff went on to say that on that Monday he received a call from Mr. Louw telling him that if he did not attend work the following day he would lose his job. Accordingly, he said, he woke up early on the Tuesday morning (at around 04h00) and went off to the police station to avail himself of the farm transport. The plaintiff said he worked a full day on Tuesday, 6 November 2012 and returned home at around 17h00. On his way home he claimed to have been accosted by 2 men who enquired of him whether he was on his way back from work. When the plaintiff told them that he had not worked that day they threatened him with harm in the event that they found out that he had done so.

[21] Turning to Wednesday, 7 November 2012, the plaintiff said that he did not go to work on that day. He testified that later in the day he had received a phone call from Mr. Louw enquiring why he had not been at the police station to meet the farm transport. He said that he told his employer that he had been threatened the previous afternoon on his way home from work, thereby intimating that he feared for his personal safety. The plaintiff testified that he spent most of the Wednesday in and around his home.

[22] The plaintiff testified that sometime between 17h00 and 17h30 on the Wednesday afternoon a friend, Alexander Tom, came to visit him. The 2 men ambled up to the police station (for reasons which were not at all clear to the court) and were required to cross the footbridge on the way. This they were able to do without incident sometime to between 17h30 and 18h30. Indeed, the plaintiff said that there were no police vehicles present when he and Tom crossed the bridge.

[23] After leaving his friend at the police station, the plaintiff said he returned home via the same route. When he got to the footbridge he noticed a number of police officers and vehicles in the vicinity. He said he was cautioned by the police not to use the footbridge as it was dangerous to do so and a safe route across the tracks was pointed out to him. The plaintiff said he then walked parallel to the railway line (in an easterly direction) towards the railway tunnel which is on the outskirts of the town. He said that he then crossed the railway line in the vicinity of the tunnel and walked across a patch of open veld before coming to Malva Street where he turned right in the general direction of the crèche. That route would, perforce, have taken him back in the direction of the public space.

[24] The plaintiff testified that just before he reached the crèche he heard the sound of gunshots coming from the direction of the footbridge. When he got to the corner of the crèche building (which was adjacent to the public space), the plaintiff said he emerged from behind the building and looked in the direction of the footbridge to see what was going on. While doing so he saw a group of angry protesters standing around shouting and toi-toiing. At that very moment he felt pain in his left eye. He brought his hand up to his face and when he cradled his left eye blood and a rubber bullet fell into his hand. He immediately realised that he had been shot.

[25] The plaintiff ran home and eventually received emergency medical attention at a local clinic. He was thereafter transported to Worcester and later Tygerberg Hospital in Cape Town where surgery was performed and the damaged eye removed. The plaintiff said he returned home on 15 November 2012 wearing an eye patch. He said he encountered Mr. Louw and explained to him what had happened.

[26] Under cross-examination it was pointed out the plaintiff that the route that he followed after crossing the railway line and turning right into Malva Street was unnecessarily circuitous. He was asked why he did not cross over the road and walk home through an informal settlement on the southern side of Malva Street known locally as "*Hasie Square*". In reply the plaintiff said that, although he had not lived in the area very long, in that time he had come to hear that Hasie Square was dangerous and crime-ridden, hence his decision to take a longer route home where there were streetlights.

[27] The cross examination of the plaintiff in regard to the events both before and after he crossed the railway line was detailed and fairly technical. Mr. Coughlan readily conceded that the plaintiff's evidence was not without blemishes and I agree with that comment. But it must be borne in mind that the plaintiff was a stranger in a foreign environment, that the situation was volatile and mobile and that as dusk drew closer visibility became compromised. In the circumstances, whether there was one Nyala or two, where precisely the police were standing and who was firing what in which direction is precisely the sort of inconsistency which one would expect from a lay witness when his evidence is measured up against a seasoned police officer who has had been able to refresh his memory from a video-clip.

THE POLICE EVIDENCE

[28] Besides adducing the evidence of certain of the police officers who were on duty at the footbridge that day, the defendant presented the evidence of Mr. Louw. The latter testified that he was appointed to the position of farm manager at *Goedehoop Farm* in December 2001. He was subpoenaed *duces tecum* by the defendant and duly produced the farm's payroll for the period relevant to this matter. According to this record, said Mr. Louw, the last time the plaintiff was paid was 24 October 2012 when he was remunerated for 8 days' work. Mr. Louw further testified that during the period 1 to 15 November 2012 no seasonal worker, including the plaintiff, was at work on the farm. He recalled seeing the plaintiff when he returned from hospital on 15 November 2012 wearing an eye patch and testified that he took a photograph of the plaintiff's injured eye.

[29] The police officers called to testify on behalf of the defendant were the local station commander, Lt. Col Kriel, W/O Isaacs of Paarl POP, W/O West of Paarl POP, W/O Bothma of the K9 Unit in Worcester, W/O Louw of the De Doorns Detective Branch and W/O Dicks, a ballistics expert who testified as to the possible causes of the plaintiff's injury. Kriel was called, inter alia, in attempt to refute the suggestion that Hasie Square was a dangerous place, while Louw testified about a statement taken from the plaintiff in December 2012. Isaacs, West and Bothma all testified about the events of the day in general, and the shooting at the footbridge in particular.

[30] West testified that he was the second in command of the POP unit on duty at the footbridge that early evening and identified himself on the video fairly easily because he is a left-handed shot. He had no difficulty singling himself out amongst the various other right-handed police officers who were discharging their firearms in the vicinity of the footbridge that day. West testified that he had been issued with a particular calibre of rubber bullet and demonstrated to the court the size of the round in question. It is best described as a hard rubber ball about the size of a small marble – about 10mm in diameter.

[31] While viewing the video, West was able to point to the electricity substation and his proximity thereto after he had crossed the railway line and moved up the slight embankment on the southern side of the track. He said he took up a position alongside the wire enclosure at the substation and sporadically fired rounds in the direction of the crowd which had then retreated into Malva Street. On the video West can be seen firing shots to his left while standing at the fence and it is possible

that one or more of these rounds may have travelled in a trajectory towards the crèche where the plaintiff says he was standing.

[32] West told the court that he believed that a group of the protesters was attempting to set fire to the substation with petrol bombs while shielding themselves behind a rubbish tip which they were rolling across the open space in the direction of the substation. West testified that because the POP unit commander (W/O Muller) remained in the Nyala that day, he (West) was in charge of the members deployed on the ground in the vicinity of the footbridge. It was West who gave orders as to when to fire and when to cease fire. He testified that his instructions that day were for the police to open fire only when they were being attacked with stones and similar objects, and to cease fire when there was no such activity on the part of the protesters. The conduct of the police officers deployed in the vicinity of the footbridge that day (as seen on the video recording) accords with those instructions.

[33] In reviewing the video material one is struck by the relative patience and reticence on the part 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 protesters, cross the railway line if necessary, discharge their firearms, repulse the protesters 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 protesters.

[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] W/O Dicks took measurements on the scene and drew up a sketch plan depicting the material points. With reference to certain forensic literature available to him, and in particular with reference to the use of a pig's head in an experiment to test the penetrative strength of the rubber bullet, Dicks came to the conclusion that, depending on the elevation of the shot-gun relevant to the horizontal, it was possible that West could have injured the plaintiff in the manner described by the latter when he fired his shotgun in the direction of the crèche while he was standing near the electrical substation. I should also point out that the time when the shooting took place (around 18h50 according to the contemporaneous commentary of the videographer) generally coincides with the plaintiff's evidence as to the time when he was injured.

[36] In the circumstances it seems reasonable to assume that, if the plaintiff was where he says he was, he was injured by a rubber bullet discharged by West. My understanding is that counsel for both parties were comfortable with this assumption. I should add that there was no attack on the integrity or reliability of the police witnesses by Mr. Coughlan – correctly so because they testified largely in accordance with what one witnesses on the video. I am accordingly satisfied that the police evidence was reliable and truthful.

THE VERACITY OF THE PLAINTIFF'S VERSION

[37] The plaintiff's evidence regarding his work attendance during the period of the strike is hard to believe, given that it is conclusively refuted by the records produced by Mr. Louw. Ms. Mayosi, who delivered the closing argument on behalf of the defendant, was critical of the plaintiff's evidence, describing him as insincere and untruthful. She suggested that the plaintiff's version went far beyond just simple mistakes and was rather a detailed fabrication involving non-existent conversations with non-existent third parties. The only reasonable inference in such circumstances, she argued, was that the plaintiff was part of the group of protesters and had been injured while acting in concert with them.

[38] In support of her argument, counsel dealt with a number of cases involving the cautionary approach to be adopted in the assessment of single witnesses. The problem with that argument is that the cases referred to are all criminal matters in which the burden of proof is higher. In addition, there is a specific statutory provision in the Criminal Procedure Act, 41 of 1977³ which permits a conviction to follow in such circumstances. I do not understand there to be any such cautionary rule in civil matters. Moreover, our criminal courts have repeatedly warned about drawing a line through an accused person's entire testimony just because he has been dishonest on a particular aspect.

³ S 208

[39] In Mtsweni⁴, for instance, Smalberger AJA , stressed that false evidence did not necessarily always warrant the ultimate inference. He observed that in evaluating false evidence on the part of an the accused person consideration should be given to a number of factors including the nature and extent of materiality of the lies, the age, cultural and social background and the level of education of the person concerned, as also the fact that deposing to an untruth might seem more acceptable in the circumstances that telling the truth.

[40] In Goodrich⁵, an action for divorce, the erstwhile Appellate Division discussed in some detail the conclusions to be drawn from false evidence given in civil matters. Greenberg JA approach the matter thus –

“The question as to its weight is not a question of law; in each case one has to ask oneself whether the fact that a party has sought to strengthen his case by perjured evidence proves or tends to prove his belief that his case is ill-founded, and one should be careful to guard against the intrusion of any idea that a party should lose his case as a penalty for his perjury. As a general rule, I think it can be said that a carefully prepared false statement, and a fortiori, a conspiracy with others that they should give false evidence, is more likely to be an indication of consciousness of the badness of the case than a lie told on the spur of the moment. But the circumstances of each case must be investigated.

⁴ S v Mtsweni 1985(1) SA 590 (A) at 593I – 594E

⁵ Goodrich v Goodrich, 1946 AD 390 at 396-7

In the present case, the fact that this false evidence was given has not influenced my decision.”

[41] In my view, a similar approach is warranted in the present case. The evidence of Dicks, with specific reference to the elevation of the firearm, suggests that the distance between West and the Plaintiff at the time of the injury was anything between 42 and 118m. Under cross examination Dicks accepted that the plaintiff's version as to where he was when he was shot was consistent with his measurements and calculations and assumptions as to where West was when he discharged his shot-gun.

[42] In my view, it is important also to have regard to the fact that the video footage in this matter covers the activity of the crowd of protesters in some detail and over a protracted period of time. When the plaintiff was struck in the eye with the rubber bullet it was undoubtedly painful and the reaction which he described - to cover his eye with his hand - is only natural. Had he been in the front line of attack amongst the protesters at the footbridge, and had he been struck by such a bullet, it is fair to assume that the plaintiff's response might have been picked up on the video footage. The absence of any such footage is, of course, not conclusive but it is consistent with the fact the plaintiff might have been partially obscured, as he says he was, behind the crèche.

[43] I have grave reservations regarding the veracity of the plaintiff's version in light of the evidence of Louw but in the absence of any direct evidence to the contrary on the part of the defendant as to the plaintiff's whereabouts at the time of the shooting, and given the defendant's acceptance of the fact that he was shot in the

vicinity of the footbridge (for the Minister's defence is based on a justification of the conduct of the police officers at that specific locality), I am unable to reject the plaintiff's evidence that he was shot while standing in Malva Street in the vicinity of the crèche, looking in the general direction of the police.

ONUS OF PROOF

[44] In light of the admission in the plea that the plaintiff was struck by a rubber bullet discharged by an employee of SAPS, the defendant drew the onus to justify the shooting⁶. The defendant raised the following defences of justification in the plea

- Self defence;
- Necessity;
- Voluntary assumption of risk; and
- Contributory negligence.

[45] The individual grounds of defence are raised by the defendant against the following statutory background.

⁶ Mabaso v Felix, 1981 (3) SA 865 (A) at 873E – 874E

THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1966.

[46] S 12(1) (c) of the Constitution provides for freedom and security of the person and the right to be free of violence whether from a public or private source.⁷

[47] S 205 of the Constitution provides generally for the establishment and structure of the national police service and s 205(3) in particular requires the police service to prevent and combat crime and to maintain public order for the protection of the inhabitants of the Republic ⁸

THE SOUTH AFRICAN POLICE SERVICE ACT, 111 OF 1998

[48] The South African Police Service Act 111 of 1998 (“the SAPS Act”) is legislation that was enacted to provide for the establishment, organisation, regulation and control of the SAPS. The following provisions thereof are relevant in this matter :

“ 13 Members

(1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member [of the SAPS] may exercise such powers and shall perform such duties and

⁷ **S12. Freedom and security of the person**

- (1) Everyone has the right to freedom and security of person, which includes the right –
 (c) to be free from all forms of violence from either public or private sources.

⁸ **S 205 Police service –**

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

functions as are by law conferred on or assigned to a police official.

(2)

(3) (a) *A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions perform such duties in a manner that is reasonable in the circumstances.*

(b) *Where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances."*

[49] S 17 of the SAPS Act provides for the establishment of a national public order policing unit ("the POP") which, in terms of ss 17(2) and (3) may be deployed locally subject to the control of the relevant Provincial Commissioner. The deployment of the POP is governed by s 17(6) which is to the following effect-

"S 17(6) The National Commissioner shall, upon receiving a direction under subsection (5), deploy the national public order policing unit or such part thereof as may be necessary to restore public order to the area concerned, and may from time to time if he or she deems it necessary, deploy additional members of the unit in the area concerned, or, subject to subsection (7), withdraw members of the unit from the area concerned if their continued presence is no longer required to

restore or maintain public order in the area concerned or in any part thereof.”

[50] When the POP is deployed it is required to perform its functions in accordance with, inter alia, The Standing Order (General) 262 on Crowd Management issued on 16 September 2004 (“SO 262”)

THE REGULATION OF GATHERINGS ACT, 205 OF 1999

[51] The Regulation of Gatherings Act, 205 of 1993 (the “RGA”) was enacted to regulate the holding of public gatherings and demonstrations at certain places. The relevant provisions of the RGA are to be read in conjunction with SO 262 and are intended to regulate the use of force by the police on crowd management during public gatherings and protests.

[52] The RGA is new order legislation designed to promote the rights of freedom of expression, assembly and association guaranteed in ss 16, 17 and 18 of the Constitution, rights which the RGA expressly provides must be exercised “*peacefully and with due regard to the rights of others..*”, thereby contemplating a balancing of proportionality with the rights of freedom and security guaranteed under s12 of the constitution.

[53] It is instructive in that s 9 of the RGA contains extensive provisions relating to the powers of the police in circumstances covered by that Act. In particular s 9(2)(b) contemplates that if a police officer of a designated rank has reasonable grounds to believe that a gathering or demonstration poses a danger to persons or

property that cannot otherwise be averted, s/he can order the crowd to disperse; if it fails to do so, the police may, for the purposes of dispersing the crowd, use force “*excluding the use of weapons likely to cause serious bodily injury or death.*” In such event, the RGA provides in s 9(2)(c) that

“(c) The degree of force which may so be used shall not be greater than is necessary for dispersing the persons gathered and shall be proportionate to the circumstances of the case and the object to be attained.”

SO 262

[54] The purpose of SO 262 is to regulate crowd management during gatherings and demonstrations in accordance with the principles contemplated in the Constitution and with due regard for acceptable international standards. Para 1(3) thereof provides that one of the duties of the police is to promote public safety and to adopt a pro-active role in an attempt to defuse conflict before it escalates to the level of violence. In terms of para 11(1) the use of force must be avoided at all costs and police members deployed for purposes of the operation in question must display the highest degree of tolerance. Para 11(1) further stipulates that the use of force and the dispersal of crowds must be in compliance with the provisions of ss 9(1) and (2) of the RGA.

[55] Para 11(2) of SO 262 prescribes a list of requirements which are to be followed by the police if the use of force becomes unavoidable. These include that

- the degree of force must be proportional to the seriousness of the situation and the threat posed in terms of situational appropriateness;
- the force is to be reasonable in the circumstances;
- minimum force must be used to accomplish the envisaged goal; and
- the use of force is to be discontinued once the objective has been achieved.

[56] SO 262 also regulates the type of weapons and ammunition that may be used by the police during “*crowd management operations*”. Para’s 11(4)(a) and (b) prohibit the use of “*37mm stoppers, ... and sharp ammunition including birdshot and buckshot*”, while para 11(4)(c) prescribes that “*the use of rubber bullets (shotgun batons) (may only be used to disperse a crowd in extreme circumstances, if less forceful methods prove to be ineffective)*”.

[57] Further, SO262 provides that “*(f)orce may only be used on the command of or instruction of the.... operational commander... Members may never act individually without receiving a command from their commander* (para 11(5)). Importantly, para 11(7) retains the position at common law, whose “*principles of self defence or private defence are not affected by this Order.*”

WAS THE DEPLOYMENT OF THE POP AND THE USE OF FORCE JUSTIFIED?

[58] The defendant argues that the members of the SAPS who were deployed in the Valley early in November 2012 were required to use the minimum force necessary so as to :

- subdue and special disperse crowds;
- maintain law and order;
- protect life and property; and
- identify and arrest the perpetrators of violent conduct.

[59] The defendant argues further that the conduct of the SAPS officers during the strike was justified if regard be had, inter alia, to the evidence of Kriel, regarding the following events which were recorded by the police's Joint Operational Command Centre, set up for that purpose:

59.1 On 5 November 2012 a group of more than 1000 people had invaded the N1 highway in the vicinity of Stofland rendering vehicle traffic impassable.

59.2 Thereafter, on the same day, the group moved westwards along the N1 in the general direction of Orchard and Sandhills and, in the process, orchards, vineyards and shops belonging to foreign nationals were burnt and looted.

59.3 On 6 November 2012 the SAPS recorded further incidents of violence in the Valley including,

- At “*Elim Farm*” where security guards opened fire on people unlawfully protesting on farm property;
- Innocent bystanders who were being intimidated by striking workers at “*De Hoop Farm*” near Hex River;
- A crowd of approximately 300 people who had burned tyres on the road in front of the “*JJ Supermarket*” in De Doorns;
- A fire at “*Monte Vista Farm*”;
- An attack on a shop in Hennie Street, De Doorns.

[60] On 7 November 2012, the following further incidents of violence were reported :

- The Sandhills community had blocked the N1 with tyres and stones;
- Large groups of people were marching along the N1 in the direction of De Doorns;
- “*Hexview Farm*” in Sandhills was set alight;
- The N1 highway was dug up near the Stofland bridge
- Vineyards at “*Modderdrift Farm*” were set alight.

[61] As already stated, many of these incidents (and others not listed) appear on the video footage and are also graphically depicted in a set of 84 colour photographs placed before the court by agreement. These photographs show -

- Large crowds of people congregating at various places in the district;
- The police being stoned by such crowds;
- Vehicles burning;
- The N1 highway damaged by burning tyres in places and elsewhere strewn with rocks and stones, to the extent that it appeared to be impassable;
- Damage to private and public property.

[62] As indicated earlier, the video material placed before the court also demonstrates events as they unfolded in the vicinity of the footbridge over the railway line. As already stated, the crowd was belligerent, unruly and acting in concert. Many of the demonstrators were hostile towards the police, pelting them with stones and bricks. There can be little doubt too that the police were justified in fearing damage to property in the commercial centre of the town, the occupation of public thoroughfares and roads and the isolation of the railway service through the town. In short, the situation by its very nature demanded the deployment of the POP.

[63] I did not understand Mr. Coughlan to take issue with the fact that the POP unit was properly deployed at the footbridge that evening. Rather, counsel sought to suggest that there were other methods of crowd control available to the police which would have rendered the use of rubber bullets excessive in the circumstances. So, it was suggested, firstly, that the police should have deployed barbed wire near the railway tracks to prevent the crowd from reaching town or ascending the footbridge. The police answer to that suggestion was that barbed wire is customarily used to block a narrow space so as to contain (or box-in) a crowd. It was said that the use of barbed wire across a wide front such as that being controlled by the police on the day in question would have been impractical given that the sections of barbed wire which are deployed are relatively short and would not have covered so wide an area. Further, it was said that the barbed wire is transported on a trailer from which it is unfurled, and has to be specifically ordered in advance.

[64] It was further suggested that use should have been made of a water cannon. The police witnesses explained that there are only 2 water cannon vehicles available in the Western Cape and that one of them was out of service at the time. The available water cannon was in Cape town (a fair distance away – probably about 2 hours by car) and it would have taken too long to bring the bulky machine through given that it is driven at the speed of a truck. Simply put, the water cannon were not readily available to the POP at that stage. In any event, West testified that use of the water cannon would not have been practicable given the presence of overhead power lines in the vicinity of the railway tracks and the risk of electrocution.

[65] Mr. Coughlan asked the defendant's witnesses why teargas had not been used by the police that evening. It was pointed out by W/O Isaacs and West that teargas canisters had been fired at an earlier stage but that due to the prevailing wind these were not effective in bringing the crowd under control. Indeed, the wind was both audible and visible on the videotape and the smoke discharged by the rifles when rubber bullets were fired can be seen drifting away on the wind fairly quickly. Furthermore, the direction of the wind was such that the police would have been firing up-wind and so the effectiveness of the teargas would not only have been neutralised but it may well have been blown back in the direction of the police.

[66] As far as stun grenades were concerned, the police appear to have made use thereof at an early stage of proceedings but, as Isaacs and West also pointed out, the effect of such grenades is no more than to cause a loud noise - other than affecting the auditory senses of a demonstrator, the stun grenade has little effect by way of physical discomfort and the discharge of such grenades did not serve to disperse the crowd on that day.

[67] In the circumstances, the police argue that their only option in the circumstances was to resort to firing rubber bullets. These were said to be extreme circumstances where less forceful options had proved (or were considered) to be ineffective.

[68] Having considered the testimony of the witnesses and having viewed the video and photographic material, I agree with counsel for the defendant that the use of rubber bullets in response to the violent crowd behavior at the footbridge was justified in the circumstances. That, however, is not the end of the enquiry. It is for the

defendant to prove that the conduct of the police was lawful and therefore justifiable. It does so by setting up the defences listed in para 44 above, and by showing that it has complied with s13(3)(b) of the SAPS Act and the relevant standing orders in employing the minimum degree of force in the circumstances.

SELF DEFENCE

[69] The pleaded defence of self defence was not vigorously pursued in argument by Ms. Mayosi. In my view this was the prudent approach. It could not be suggested in the circumstances that prevailed that armed police officers clad in protective riot gear (including helmets) were confronted with such immediate danger that the only option open to them was to discharge rubber bullets at the attackers. It was, for instance, open to the police to turn on their heels and leave the area, thereby reducing the level of personal risk immediately. In fact, as I have said, the video footage shows them retreating behind the police vehicles and under the footbridge.

[70] In Mugwena⁹ Ponnann JA postulated the approach to such a defence as follows:

“Homicide in self-defence is justified if the person concerned

‘...had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury, that the means he used were not excessive in relation to the danger, and that the

⁹ Mugwena v Minister of Safety and Security 2006(4) SA 150 (SCA) at [22]

means used were the only or least dangerous whereby he could have avoided the danger.’(R v Attwood 1946 AD 331 at 340)

The test is an objective one. The question to be answered is whether a reasonable person in the position of Constable Matumba would have considered that there was a real risk that death or serious injury was imminent.”

Objectively speaking, there was no such danger to West *et al*, nor did any of the police officers make any such claims in their evidence. Accordingly, I am satisfied that the defence of self defence has not been established by the defendant in the circumstances

NECESSITY

[71] In order to constitute a lawful defence, necessity must involve a threat to some legal interest, for instance, a threat to life or limb, or a threat of damage to property. The approach was usefully summarised by Kriek J in Chetty¹⁰, a case in which the plaintiff had been bitten by a police dog while the police were endeavouring to control an unruly crowd of people outside a furniture shop at which a sale was being held.

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

¹⁰ Chetty v Minister of Police 1976 (2) SA 450 (N) at 452F – 453A

1. *There must have been reasonable grounds for thinking that, because of the crowd's behavior, 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....*

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."*

[72] The learned judge went on to refer to the cautionary remarks of Van Winsen AJ (as he then was) in Ntanjana¹¹ –

"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

¹¹ Ntanjana v Vorster and Minister of Justice 1950 (4) SA 398 (C) at 406A;

the armchair critic, wise after the event, weighing the matter in the secluded security of the courtroom...

[73] The *dictum* of Van Winsen AJ has particular relevance in the present case because it was argued before him that the applicable Standing Orders relevant to the situation at hand placed a higher standard of duty on the police than would otherwise have been expected. The court rejected that notion and commented as follows at 410C:

“After a perusal of these Standing Orders I cannot agree that this contention is well founded. Even if it were, that cannot affect the common law liability of the police which is what the Court is here called upon to consider. While it may well be that a man imbued with a higher than normal sense of responsibility in the execution of his duty as a policeman might very well have been prepared to take the personal risk of grappling with the deceased and thereby save the deceased’s life, Constable Vorster cannot in law be held responsible for failing to disclose such a sense of responsibility. 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.”

[74] Ms. Mayosi also relied in argument on the decision in Petersen¹², a case in which the police were attacked and stoned by an angry crowd which had gathered

¹² Petersen v Minister of Safety and Security [2010] 1 All SA 19 (SCA) at 23

while they were arresting people for the illegal possession of abalone. In the process the police had initially fired rubber bullets from their shotguns (to no avail) and then resorted to the use of sharp point ammunition (aiming at the ground) when they ran out of rubber bullets. In the process a young man called Justin Petersen was injured and his mother sought damages from the police in the local magistrates' court.

[75] On appeal to the Supreme Court of Appeal, Brand JA approach the matter thus:

“[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 defendant’s action must be directed at a wrongful attacker. There was therefore no need for the respondent to establish that Justin was himself part of the attacking crowd. What the respondent had to prove in order to establish the justification defence of necessity appears, for example, in broad outline, from the following statements in ‘Delict’ volume 8(1) LAWSA (2ed) by JR Midgley and JC van der Walt, paragraph 87:

‘An act of necessity can be described as lawful conduct directed against an innocent person for the purpose of protecting an interest of the actor or a 3rd 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...’ ”

[76] In light of the situation which existed on that day in the Valley generally, in and around De Doorns in particular and at the footbridge specifically, I am of the view that the police were lawfully discharging their statutory duties under s 207(3) of the Constitution and the SAPS Act to maintain public order and secure the safety of the inhabitants of the area and their property, when they took control of the volatile and dangerous situation in the vicinity of the footbridge and the electric substation. The question that then follows is whether they adhered to the recognized common law principles in general, and to the requirements of SO 262 in particular. The test in both instances is similar – objectively viewed, was the force employed proportional to the threat which presented?

[77] It is significant to note that, as one sees on the video footage, the arrival of the police on the scene was immediately met by a violent response from the crowd across the railway tracks. The numbers were stacked against the police - about a dozen or so of them against several hundred protesters - and the latter showed no inclination to retreat. On the contrary, the protesters advanced aggressively and tauntingly towards the law enforcement officials: some even came over the bridge to confront the police as they were ascending it from the northern side notwithstanding

the earlier use of stun grenades and rubber bullets in an attempt to repel them. Having effectively prevented the crowd from crossing the railway line and reaching the business centre of the village, a further danger presented. The attempt by a part of the crowd to attack the substation is apparent from the video footage and that activity presented a real and imminent threat to public safety and public property in the area.

[78] There was, in the circumstances, no other option for the police in their attempts to restore calm and protect property. West, as the senior officer on the ground, was justified in giving the order to fire rubber bullets and he himself was entitled to take aim at those persons intent upon damaging the substation and to fire rubber bullets at them so as to stop them in their tracks. To quote from the words of Brand JA in Petersen :

“[12] In the circumstances counsel for the appellant was unable to propose any realistic alternative means by which the police could avert the danger. And I can think of none. Before firing sharp point ammunition they had essentially tried everything else. The question which sometimes arises in matters of this kind, namely, whether the defendant should rather have fled, does not even occur. At the stage when the police started to fire live ammunition, their attackers simply did not allow them to flee.”

With the necessary paraphrasing for the facts at hand, I am of the considered view that when the police resorted to firing rubber bullets they had tried everything else and were unable to bring the crowd under control and restore order. And, when they did open fire they did so sporadically and with the requisite degree of constraint.

[79] Mr. Coughlan submitted that the crowd posed no direct danger to the police and when they opened fire they did not do so in order to defend themselves “*from a real threat of stones and petrol bombs*”. Counsel went on to suggest that the police should rather have taken up a defensive line at the railway tracks and that it was likely that the crowd would have dispersed of their own accord when they ran out of stones, or as darkness descended. This was described as a realistic alternative by which the police could have averted the danger resulting from the stone throwing.

[80] I do not agree with counsel’s submissions. Not only are they based on a rose-tinted viewing of the video footage, they are speculative and unhelpful in the circumstances, emanating as they do from “*the secluded security of the courtroom*”. The court was fortunate to view, first hand, the mayhem which prevailed that evening. The circumstances included an imminent attack on the substation, the potential damage which could be caused to the railway line (a crucial logistical artery to the interior of the country) and the prospect of further damage to businesses in the town. That state of affairs did not permit the police to flee the scene. To do so would have been a complete abandonment of their constitutional and statutory duties. Indeed, those very duties compelled them to take up a position which necessitated the dispersion of the crowd.

[81] The fact that the plaintiff may have been shot shortly after he emerged into the open at the corner of the crèche while not taking part (as he claimed) in the unlawful activities of the crowd, does not mean that the police (and West in particular)

acted unlawfully. On the basis of the authority already referred to¹³, the defendant does not incur liability since West was lawfully about the duty of protecting public property and maintaining law and order when he discharged his shot-gun in the direction of the crèche.

VOLUNTARY ASSUMPTION OF RISK

[82] In view of the fact that I have found that the defence of necessity has been established by the defendant, it is not strictly necessary to deal with this additional ground of defence put up. However for the sake of completeness I shall do so briefly.

[83] The defence of volenti non fit iniuria requires the defendant to establish that on that evening the plaintiff had knowledge of the risk of injury, appreciated the ambit thereof and consented to such risk.¹⁴ It is a defence which is not easily discharged and must be applied by the court with great circumspection and caution.¹⁵ The point of departure is that no one can recover damages for an injury “*for which he has himself to thank*”.¹⁶

[84] The test for knowledge of the risk on the part of the plaintiff is, firstly, an objective assessment of the facts to establish what inherent risks existed, and

¹³ Petersen at [11]

¹⁴ Santam Insurance Co. Ltd. v Vorster 1973 (4) SA 764 (A) at 781 B - E

¹⁵ LAWSA 2nd ed Vol 8 Part 1 at p167 *et seq.*

¹⁶ Maartens v Pope 1992 (4) SA 883 (N) at 886 G-H

secondly, a factual finding as to whether the plaintiff foresaw the actual risk that later ensued and caused his injuries.¹⁷

[85] Under cross examination by Mr. Botha, the plaintiff said that he had attended a mass meeting at the sports fields on the Friday and that he had accompanied the group of marchers as they move down the N1 highway. He would therefore have been aware of the presence of heavily armed police in the district at that stage already. The plaintiff's evidence was that when he approached the footbridge on the evening in question he was warned by the police not to cross it. He said, initially, that he thought that he had been warned because of the possibility of being hit by stones thrown by the demonstrators. However he later conceded that he was aware of the fact that there were armed police and armoured vehicles in the vicinity of the footbridge, and that there was the likelihood that the police might open fire on the demonstrators. He also accepted, albeit somewhat begrudgingly, that if he crossed the footbridge he might be injured by a rubber bullet fired by the police.

[86] The plaintiff confirmed in cross examination that the reason he had been directed away from the footbridge by the police was because that it was considered to be unsafe to be in that area. He therefore opted to follow a safer option by crossing the railway line in the vicinity of the tunnel. When the plaintiff reached Malva Street he did not take the shortcut available to him through Hasie Square but proceeded on down the road past the crèche. He accepted that at that stage he was walking in the direction of the group of protesters and he heard gunshots coming from the direction of the footbridge which was away to his right. He confirmed, also, that he appreciated

¹⁷ Vorster, *ibid.*

that the police were probably shooting in the direction of the protesters. All that notwithstanding, the plaintiff continued walking along Malva Street because, as he then suggested under cross examination, it was getting dark and it was not safe to be on the street.

[87] In the prevailing circumstances I am satisfied that the plaintiff appreciated the risk implicit in walking towards the demonstrators. He knew the police were firing at them and he accepted the consequences of proceeding down the road, rather than seeking shelter in front of the crèche, where he would have been out of the line of fire and not likely to be hurt by a bullet discharged by police firearm. Accordingly I am satisfied that the defendant has established the defence of voluntary assumption of risk.

CONTRIBUTORY NEGLIGENCE

[88] The courts have often cautioned against confusing the concepts of contributory negligence and voluntary assumption of risk¹⁸. In light of the finding that the defendant has successfully established the defence of necessity, the alternative defence of contributory negligence falls by the wayside. But, in any event, in the absence of any finding that the police were negligent in the way in which they conducted themselves that evening, there is no room for a finding that there was contributory negligence on the part of the plaintiff: he cannot be regarded as a joint wrongdoer in the circumstances. In any event, no argument was presented by Ms.

¹⁸ See, for example, Vorster at 777

Mayosi in relation to this ground of defence, and I understood therefore that the defendant had abandoned this line of defence.

CONCLUSION

[89] In the result I am satisfied that the defendant has discharge the onus of proving that the police action in which the plaintiff was injured on 7 November 2012 at De Doorns was lawful, that the degree of force applied in the circumstances in defending life and the property of others was not excessive and that the defence of necessity has accordingly been established. His claim for damages can accordingly not succeed.

ORDER OF COURT

The plaintiff's claim is dismissed with costs

GAMBLE, J