



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

Case Number: 19714 /

2014

In the matter between:

BLUE MOUNTAIN PRODUCTS CC

First Plaintiff

A F HANEKOM SAAGMEULE CC

Second Plaintiff

and

MINISTER OF POLICE

Defendant

Coram: Wille, J

Dates of Argument: 3rd and 4th of August 2020

Date of Judgment: 7th of September 2020

JUDGMENT

WILLE, J:

INTRODUCTION

[1] These are action proceedings instituted against the Minister of Police cited herein as the *office bearer* ostensibly vicariously liable for the alleged unlawful conduct of certain members of the South African Police Services.¹

[2] There are two plaintiffs, both are close corporations, one trading under the name and style of Blue Mountain Products CC² and, the other trading as A F Hanekom Saagmeule CC.³ The issues of quantum and merit have been separated out and this matter deals only with the merits of the plaintiffs' claims against the police.

THE PLAINTIFFS' CAUSE OF ACTION

[3] In summary, it is alleged that during November 2012, certain protest action turned violent in the *Witzenberg Valley*' area. These protesters damaged, looted, torched and destroyed both the movable and immovable property owned by BMF and HSF. Further, that

¹ The 'police'

² BMF - the Blue Mountain Factory

³ HSF- the Hanekom Saagmeule Factory

the police instructed the members and employees of BMF and HSF to evacuate their properties as the police were unable to ensure their personal safety, possessions and their properties. The main protest action relevant to this action occurred in Waboom Avenue⁴, in the industrial area of the town of Prince Alfred's Hamlet.⁵

[4] The plaintiffs plead that a legal duty bears down on the police in view, inter alia, of the provisions of section 205(3) of our Constitution, which provides as follows;

'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'

[5] Further, it is alleged that in terms of the South African Police Service Act⁶, one of the obligations that fall upon the police is to maintain law and order and to prevent crime. As the agents of the state, the police are responsible for the discharge of a constitutional duty to protect the public against, inter alia, the invasion of their constitutional rights by people involved with criminal activity. It is further pleaded that the police owed a duty of care to be present, alternatively, ought to have been present at all times, so as to prevent damage occurring to the plaintiffs' properties.⁷

[6] Finally, the police as employees of the minister, unlawfully and negligently failed to protect the constitutional rights of the members and employees of BMF and HSF in, inter alia, the following respects; that no measures were timeously introduced to barricade certain areas so as to prevent and limit the threats to the plaintiffs' members and employees and

⁴ WBA

⁵ PAH

⁶ Act 68 of 1995

⁷ Both movable and immovable

damage to their properties; that an inadequate number of police were deployed to protect the plaintiffs' properties and monitor the protestors so as to prevent damage during these violent protests, and that the police failed to take all steps necessary to protect the plaintiffs' properties

THE DEFENDANT'S PLEA

[7] The defendant in turn, on the pleadings, denies that in the circumstances of this case the police owed to the plaintiffs a legal duty of care. It is further denied that the police acted unlawfully or negligently. Further, alternatively, in the event that it is held that the police indeed acted negligently, then in that event, it is pleaded that the police were not 'causally' negligent.

[8] Furthermore, it is pleaded by the defendant that in the event that the police were negligent (which is denied), then in that event, the damage or losses to the plaintiffs was caused partly due to the negligence of the police and partly due to the fault of the plaintiffs in, inter alia, the following respects; that the plaintiffs failed to implement adequate steps to protect their own properties; that they failed to take adequate steps to prevent fires and damage to their own properties; that they failed to alert the fire brigade services timeously so as to prevent the damage to their properties, and they failed to take any or adequate steps to remove the movable items from their immovable properties, before these properties were damaged and destroyed.

[9] Finally, it is pleaded that public and legal policy considerations militate against the minister from being held liable for the damages suffered by the plaintiffs as a result of the

alleged conduct or omissions by the police. Put in another way, the police did not act unlawfully.

THE PLAINTIFFS' CASE

Mr Hanekom

[10] Mr Hanekom owns fifty percent of the members interest in and to the first plaintiff. The remaining members interest is owned by a family trust. He averred that he was duly authorized to represent the first plaintiff in these proceedings.

[11] The business of the first plaintiff commenced in 1999. It's business consisted mainly of the processing of fresh fruit, dried fruit and nuts. These products were sold as 'fruit sweets' once sugar had been added to them and they had been processed. About (23) tons of product was sold every month. During this time, he resided in PAH⁸, about a kilometre from the BMF. He now lives in Hopefield near Saldanha on a small farm and has attempted to rebuild his business but has lost at least half of his previous market share.

[12] In November 2012, he was in charge of the business of the first plaintiff. He employed (31) permanent staff members and did not employ any seasonal farm workers. The obligatory minimum wage at that time was R 69,00 per day, but despite this, he paid his workers R 180,00 per day. He never suffered any labour disputes or any wage issues with his workers. Most of his workers resided in PAH and in the nearby Ceres and Bella Vista areas.

⁸ The town is actually named Prince Alfred's Hamlet.

After his factory was destroyed, he was unable to re-employ his workers and regretfully most of his workers were retrenched, with the appropriate retrenchment package.

[13] He had a high security fence around his property with an alarm system which monitored both the inside and the outside of his factory. This alarm system could be triggered and activated so as to prevent damage from being caused to his property. He also had (4) guard dogs that he has since buried as same were badly injured during the protest action.

[14] A plan⁹ of the area, prepared by a land surveyor was handed in and marked as an exhibit. The plan clearly indicates the location of the first and second plaintiffs' factories and also the nearby factories and the nearby housing development.¹⁰

[15] The area of land upon which the BMF was situated was approximately eight hectares in extent. The factory premises comprised about (1000) square meters. Phase four and five of the housing development had also since been developed in close proximity. Significantly, there is still vacant land situated behind the property of the second plaintiff and there is also vacant land behind the BMF. A satellite map was also introduced into evidence which exhibited an aerial view of the various factories, roads and the housing developments in this area. The local police station was about one and a half kilometres away from the BMF and the entire local industrial area consisted of about (2,34) square kilometres.

[16] During August 2012, Mr Hanekom first became aware about the possibility of protest action at the instance of farm workers in the '*De Doorns*' area. He recalls that indeed, during September, parts of the national highway were barricaded and protests flared up at the

⁹ The 'plan'

¹⁰ The development was a 'phased' development

beginning of November 2012. He formed the view that these protests related solely to farm workers and not to factory workers. Protests also erupted in the nearby *Tandfontein* area.¹¹ This, also during the early part of November 2012.

[17] On the 12th of November 2012, a number of protests occurred in the Ceres area. Mr Hanekom did not foresee that these protests would involve any of his factory employees. On Monday¹², his factory operated normally and all his employees were at work and he did not foresee a threat of any harm. On the morning of the 13th November 2012, he dropped his children off early in the morning at a friend's home as he had to attend a meeting in Cape Town.

[18] He left for Cape Town at about 6h30 in the morning and whilst on route, and just before 07h00, he received a call from one of his employees. It was reported to him that a number of protestors had gathered in WBA and his employees had locked themselves inside the factory as they were fearful. He abandoned his trip to Cape Town and returned to his factory in PAH.

[19] Upon his arrival, at the intersection of WBA and Voortrekker Road¹³, and in the vicinity of the production entrance of Du Toit Sawmills¹⁴, he encountered a number of police vehicles and members of the police. He communicated with Warrant Officer Oosthuizen and advised him that his administrative staff and employees were in attendance at his factory. He was advised that it would be prudent, in the circumstances, for all his employees to vacate the factory. Further, he was advised to liaise with Major Truter in this connection. He requested

¹¹ A nearby farming area

¹² The 12th of November 2012

¹³ VTR – this road is also known as the 'R303'

¹⁴ In the nearby vicinity of his factory - DTS

permission from Major Truter to visit his employees at his factory. Major Truter advised him that he could not prevent him from going, but that at the same time, he could not guarantee his safety under these particular circumstances.

[20] He went to his home and collected his (9mm) firearm and proceeded to his factory.¹⁵ He stopped near the front gate of his factory and met up with the security personnel, employed by the second plaintiff. A large crowd of protestors had gathered and demanded to know as to the whereabouts of his employees. He attempted to open the gate to his premises and was thereupon pelted with stones, threatened and abused by the protestors.

[21] During this time, the police started to shoot at the protestors with rubber bullets in the nearby vicinity. According to him, this caused the protestors to become more agitated and approximately (40) of the protestors, subsequently mounted a charge towards the gate of the first plaintiff's premises. Further, they hurled stones and uttered threats. In response, he drew his firearm, causing the protestors to retreat momentarily. This, in turn, enabled the gate to be opened for him to enter upon his premises. The windshield of his vehicle was damaged in the process by the protestors.

[22] He found his employees scared and huddled together in his premises. He advised them that according to the police, it was not safe for them to remain and that they would have to vacate the premises. He instructed them to remove their uniforms so that they would not in any manner be targeted by the protestors. He managed to evacuate his employees from his factory. Two police vehicles effectively sealed off the entrance to his factory so as to allow the evacuation to take place safely. After his staff were evacuated, he went to report the

¹⁵ Via the means of a gravel road towards the rear section of his premises and not via WBA

matter to the police in PAH and thereafter requested his ex-wife to collect his children and take them back with her to Cape Town.

[23] The records from the police station, inter alia, record that Major Truter logged a report on the same day to the effect that Ceres Valley Fruit¹⁶, had been burnt down by the protestors. He returned to WBA and requested Warrant Officer Jones¹⁷, to place some police vehicles on his premises, presumably in an effort to prevent any further damage to his factory and the content thereof. He was advised that the police were doing all in their power in an attempt to control and stabilize the protest action.

[24] Despite his specific request for assistance, according to him, no police vehicles were stationed on his premises. This, despite the fact that police vehicles were indeed placed on the premises of DTS, and a 'Nyala' police vehicle on the premises of CVF.

[25] On the following day¹⁸, his staff did not attend upon his factory as he had advised them to stay away until the situation had stabilized. At about 10h00 he observed smoke coming from the industrial area of PAH and he drove to the area. He noticed a few people at DTS and noticed that the gate to these premises was open. He entered these premises and was met by the manager and the foreman of DTS. He observed two members of POPS patrolling the fence between BM and DTS. He enquired from the POPS members as to why they were patrolling outside the fence and not on his factory premises. He requested the two POPS members to proceed onto his premises. They replied that they had been specifically deployed and were under orders to patrol the fence between the two abovementioned properties.

¹⁶ CVF

¹⁷ Who was in charge of the Public Order Police - POPS

¹⁸ The 14th of November 2012

[26] He requested permission from the manager of DTS to cut the fence so that he could go onto his property. Despite this, the members of POPS attempted to stop him from entering his premises. He was permitted to retrieve his badly injured dogs, which he immediately took for treatment.

[27] Later during the day and at about 18h00 he returned to his factory. There were no protesters in sight at this time. CVF had been burned down completely. Two police vehicles were present on his premises and he asked if they could please remain on his premises. These police members replied that they were unable to do so, as they were not private security guards. At this time, the entrance gates to his premises had been destroyed, the doors to his factory premises were open and a portion of his administrative offices had been burnt down. As a result, he sought advice from his neighbour¹⁹, who advised him that the police were not employed as private security guards and that he was ultimately responsible for the protection of his own private property.

[28] During that evening²⁰, he again observed smoke coming from the industrial area of PAH and proceeded to his factory. He noticed that one of the production stores at his factory was burning. The fire-brigade was present and they were spraying water onto piles of wood, situated on the premises of DTS. Neither the police, nor the fire-brigade entered upon his premises, this despite the fact that no protestors were present at that time.

[29] He approached the fire-brigade who advised him that regrettably they would not be able to assist as their vehicles were at risk of being damaged by the protestors. He left and arranged for the removal some of the movables from his premises on the following day. At

¹⁹ Warrant Officer Esterhuizen

²⁰ At about 20h00

about 10h00, some members of POPS arrived and requested him to leave his premises as a group of protestors had mobilized and were agitated. At that stage, a major portion of his factory was still intact. He was escorted from the area by POPS and he noticed that group of about (50) protestors in the vicinity.

[30] These protestors seemed hostile, but not violent. Mr Hanekom addressed them directly and asked them please to stop the looting and burning of his factory. One of the protestors was smoking cannabis in full view of the police who took no action. He left his premises with some of goods that he had managed to salvage.

[31] Later on during the day he was advised that the protest action had been suspended for at least two weeks as an agreement had been brokered. He formed the view the protest action was at an end. On the following morning²¹, he together with an insurance broker and a loss adjuster went to his premises. Whilst on the premises, they were approached by the police who advised them to leave as protestors were in the area. The police advised him to employ private security personnel to secure his premises as they did not have the sufficient manpower to protect his premises. He attempted to arrange such private security, but was advised that this was not possible as the private security companies that he contacted did not want to endanger their employees.

[32] Later that very afternoon, Mr Hanekom proceeded to the local police station and preferred a charge of arson against the protestors. In the early hours of the morning on the 17th of November 2012, he received a call from the police to the effect that his factory had,

²¹ The 16th of November 2012

once again, been torched. He proceeded to his factory and noticed that it was burning. The fire brigade was present and attempted to douse the flames, but could not save his factory.

[33] A number of photographs were taken of the scene and entered into the record as exhibits. Further, certain video footage was entered into the record and marked as an exhibit. Finally, he expressed an opinion to the effect that the police, *'could and should have'* taken steps to protect his property as the police must have known that the factories in the area would be targeted by the protestors. The total destruction of his factory took place over an extended period of (4) days and in his view, the police 'sacrificed' his factory, together with some other factories at the expense of protecting and saving other factories. He was of the view that certain factory owners were given preferential treatment by the police.

[34] Initially, the cross-examination of Mr Hanekom focused on certain technical issues surrounding the validity of the resolution signed on behalf of the first plaintiff, purporting to authorize him to pursue this action against the defendant. This 'defence' was not vigorously pursued and eventually wisely abandoned by the defendant. It was established that his factory could not be restored for the use of food production as some asbestos cladding had been burnt when his factory was destroyed. Approximately a year after his business was destroyed, he received an insurance payment of about (8) million rand for the loss of his factory and its contents. He was eventually able to obtain premises in Hopefield²² in order to rebuild his business. He re-established his business at the beginning of 2014.

[35] He was driven to concede; that the local police station was a very small station; that it had to service an extremely vast area; that many areas were affected by the protestors; that

²² Near to Saldana Bay

the protest action was a well-orchestrated campaign led by certain trade unions; that the protestors were transported to different locations in order to protest and that unprecedented and extra-ordinary circumstances prevailed.

[36] It was common cause that mass destruction occurred in the underlying area and that many people feared for their lives and properties. Two police stations were attacked and burnt down in the area. There were approximately (192) farms under the control of the local police and many seasonal workers were in the area, with up to (25000) people working on the farms during this seasonal period. The area under the control of the local police was about (3,554) square meters in extent, a lot of which consisted of very mountainous terrain.

[37] There were two satellite police stations in the area and the PAH police station was very small and was left to monitor a very large area. The police suffered from severe resource issues during this time. They were obliged to manage a very large area and had to monitor an unprecedented and well organized protest action. The police were obligated to prioritize issues of '*life and limb*' as compared to issues of protecting private property. Woman and children had to be evacuated at very short notice under treacherous conditions. There were (97) reported insurance claims and the amount claimed on insurance, exceeded (120) million rand in damages.

[38] A map was entered into evidence and marked as an exhibit which clearly illustrated the vast area that was subject to the control by the police in PAH. There were many incidents of arson in the immediate vicinity as the protestors were engaged with protest action that was well-orchestrated. Further, many protests broke out simultaneously in the vicinity of a satellite police station, called '*Op die Berg*'. Further, the official police occurrence logbooks

recorded that a member of the police was injured while performing routine patrols and crime prevention in the vicinity of the first plaintiff's factory, during this time. Critical municipal services were centralized in the nearby town of Ceres. The fire brigade's capacity was stretched to limit as there existed a very high fire risk at this time.

[39] Significantly, he conceded that his factory and the factory belonging to the second plaintiff was very easily accessible to the protestors because of their geographical location in relation to the nearby various phased township developments and also from the property owned by DTS, which was significantly larger than the property occupied by his factory. Phase four and five of the housing developments were a very short distance away and at this time, consisted mostly of informal occupiers.

[40] A theory was advanced to the effect that the plaintiffs' properties should have enjoyed the same protection afforded to the property of DTS. In his view, the entire industrial area should have been protected by the police, whilst at the same time, he did accept that there were only about (15) police vehicles at the disposal of the police, during this time. He agreed with the suggestion that the protest action was very well organized and the protesters were transported to different locations and that it was very difficult to monitor and manage the protestors.

[41] In addition, he agreed that prior to the meeting with the loss adjustor of his insurance company, he was unable to make alternative arrangements to place private security on his premises to protect his property. This, despite a threat issued out to him by the protestors.²³ Despite his main complaint, that the police did not permanently place a vehicle on his

²³ On the 12th of November 2012

premises to protect his property, he conceded that no private security company, or indeed the fire brigade, was prepared to access the area without police protection, as the situation was volatile.

[42] After his factory had been destroyed, his insurance company insisted that private security guards be placed on his property and despite this, the looting of his factory continued. Finally, in response to a question that I posed to him, he agreed that the primary focus of the police was to prevent harm to '*life and limb*' and their secondary function was the protection of property.

Mrs Hanekom

[43] Mrs Hanekom is not related to Mr Hanekom who testified on behalf of the first plaintiff. Mrs Hanekom is a member of the second plaintiff close corporation. Her husband owns a (60) percent members interest in and to the second plaintiff and she holds the remaining (40) percent interest. The second plaintiff traded under the name and style of A F Hanekom Saagmeule CC and had since changed its name to AFH Services CC.²⁴ Mrs Hanekom was the financial manager of the business and was also in charge of the marketing for the business.

[44] Its business was that of the 'mining' of pine wood. Pine trees were bought from plantations, these were cut down and pallets and crates were made for use in the fruit industry. The sawmill business could no longer continue as the electrical footprint, together

²⁴ HSF

with all the machines were destroyed and it was not viable to purchase new machinery, as these machines were not readily available in South Africa. New machinery could be sourced from abroad but would have to be re-engineered at great financial cost. They also did not feel safe as they felt that they did not belong in the area, after their factory had been destroyed. The second plaintiff employed (90) permanent workers and about (60) seasonal workers.

[45] Some of their employees lived in Porterville and they had purchased a small pick-up vehicle for them so that they could be transported to work on a daily basis. Others, lived in Nduli and in Bella Vista.²⁵ Their factory was situated adjacent to phase three of the housing development consisting mostly of small houses. Behind their factory was located, phases four and five of this housing development.

[46] She did not foreshadow any difficulties in connection with the protestors during this time as none of their employees were farm workers. Further, the second plaintiff's property was secured by a high fence, security dogs and a camera system covering both the administration offices and the entrance to the factory. The system consisted of eight security cameras strategically placed. Further, there was an alarm system in the administration offices connected to a security company based in Ceres. Security lights were also installed at various locations.

[47] A security officer lived on the premises with his family. He regrettably passed away shortly before the trial. Water pipes were installed along the perimeter fences which were connected to the water pipes from the municipality to be utilized in the case of a fire.

²⁵ Both small villages in the area

[48] Sometime prior to the protest action she received communication from her insurance broker to confirm with her that her SASRIA insurance was in place. This communication was initiated in view of the anticipated protest action by the farm workers. She lived in Ceres and travelled to work every day.

[49] Whilst on route to work²⁶, she noticed a number of police vehicles, including a 'Nyala' at the police station in Ceres. This prompted her to call the police in Ceres but they were not able to give her any specific information about the protests. On the following morning, she received a call from her security officer who advised her that there were protestors in the area. Nevertheless, she was advised that it was calm outside her factory and that it was safe to come to work.

[50] She notified her employees that were on route and requested them to meet her at the intersection of VRH and WBA, in order that the situation could be assessed. They all arrived at the intersection at about 06h30 and she noticed a number of police vehicles and about (8) police members stationed outside the premises of DTS. The protestors seemed peaceful and calm. She spoke to her employee who resided on the premises and he confirmed that the situation was peaceful and her employees indicated that they wished to proceed to work.

[51] The police advised against this course of action and explained to her, that in their view, they were at risk. Their employees left, but both she and her husband elected to proceed to their premises. Upon arrival, the protestors being aware of their presence, immediately became agitated and demanded that they vacate the area and not open the factory. Some of the protestors aggressively advanced towards them and they accordingly left their premises.

²⁶ On the 12th November 2012

Later that afternoon, they again made enquiries from the police and were advised that the situation was calm and accordingly they left for a meeting in Cape Town.

[52] Whilst on route back from Cape Town, she was advised that the protestors had set alight to the premises of CVF and that some of the wooden logs at the back of their factory, had also been torched. She notified the fire brigade services in Ceres, who in turn advised that they were on the scene. Upon her arrival, she observed two vehicles from the fire brigade services inside the premises of DTS. She requested the police and the fire brigade services to extinguish the fire at the back of her premises. They declined to assist as the access roads were littered with stones and burning tyres.

[53] Later that evening, the fire at her premises seem to have subsided and she again called her resident employee. He advised that the fire had indeed subsided although some of their wooden product was still smouldering. During this time, she observed a police helicopter flying in the area.

[54] During the course of that night, she received a message to the effect that the second plaintiff's factory was burning once more, but that the fire brigade was in attendance. The fire brigade had assisted in dousing the fire at the back of their premises. She advised that she would be attending on the factory to collect her dogs and other belongings. In addition, her husband went into the premises and salvaged a truck and a tractor during this time.

[55] On the 14 November 2012, she received information to the effect that the situation at her premises was calm and that if she wanted to salvage further items from their factory, that it would be an opportune time to do so. She arrived at the intersection of WBA and VTR at

about 6h30 and requested permission from the police to accompany her to her factory. The police refused on the basis that, in their view, it was not safe.

[56] She went to her factory²⁷ and removed some of her financial documents and salvaged a fork-lift and some other machinery. She was subsequently advised that protesters had arrived at the back of her factory and that it was unsafe and that she should leave. Whilst in the process of leaving she was approached by a number of angry protesters who threatened to burn down their factory. She never reported this incident to the police.

[57] At about 8h30 on the 14 November 2012, she received a call from her security officer who advised that the protesters had set alight to certain wooden logs at her premises and were also looting wood from the premises. She drove to the police in PAH and asked them for their assistance. At about 9h00 she received a call reporting that the protesters were burning wood and certain machinery on the side of the factory. Her security officer had been chased away from the premises. She proceeded to the police at the intersection of WBA and VTR and reported the matter to them and also to the fire brigade. According to her, they did nothing further to assist her.

[58] At about 10h30, she noticed dark smoke emanating from the vicinity of her factory and was advised that the construction premises next door to her premises, had been set alight. She testified that according to the camera footage at her disposal, a *Nyala* police vehicle was in the vicinity at the time, but they merely drove past her burning factory. Further, according to her, the police were in the vicinity, but did not attempt to stop the protesters from looting her premises. Within the space of about (1) hour, her factory was torched and looted despite a police presence in the area.

²⁷ Via the rear entrance on a gravel road

[59] Despite her repeated requests for police assistance and intervention, they did nothing to prevent the arson and the looting of her premises. She wanted the police to enter her factory, via a different side entrance, in order to stop the looting and arson. It was only after most of her factory had been destroyed and the roof had collapsed, when the fire brigade eventually arrived on the scene.

[60] Much of the cross-examination was focused on the '*summary of losses*' schedule as annexed to the second plaintiff's particulars of claim. She was unable to explain how the losses were calculated with reference to a number of these claims. In her defence, she advanced that she had provided to her attorneys and to her insurance company certain schedules and she was not the author of the 'summary of losses' schedule. She conceded that this summary did not show a true reflection of the losses sustained. Further, she conceded that the land upon which the second plaintiff's buildings were constructed, was registered in her husband's name and not in the name of the second plaintiff.

[61] She agreed that her factory was readily accessible and that this was an extremely volatile and difficult time for the police. Many roads and farms were damaged and a police station was attacked and torched by protesters. It was put to her that there were (194) farms in the immediate area and that the police had to protect and control an area which was no less than (3055) square meters in extent.

[62] She voiced some concern about the fact that the property of DTS was protected at the expense of other property owners. It was suggested to her that the police took a '*strategically security based decision*' to place themselves at the intersection of WBA and VTR in order to

prevent the protestors from entering into the town of PAH. The strategy of the police being to push the protestors back down WBA, when they advanced towards the town of PAH.

[63] She conceded that this was the worst protest action seen in the history of the Western Cape and had a devastating effect on the farming community. She agreed that the police had to prioritize their responses to the protest action and that the protection of '*life and limb*' was more important than the protection of private property. It was suggested to her that no less than (29) towns were affected by the protest action and that at least (97) claims were lodged with SASRIA, with insurance claims amounting to a staggering (120) million rand.

[64] During August 2012, the protestors caused severe damage to an area known as '*De Doorns*' and the national highway was damaged. She testified that she did not foreshadow any problems at her factory because she did not employ any farm workers and the wages that she paid, were in excess of the prescribed wages. She further stated that she did not believe the protestors when they threatened that they would burn down her factory.

[65] She conceded that she took no steps by way of additional security measures to protect her business after the threat was issued to burn down her factory. She believed that she was badly let down by the local fire brigade. She was unable to name the police officials or the members of the fire brigade with whom she communicated in an attempt to prevent the damage to her factory. She conceded that the police may have prioritized their efforts elsewhere when she requested their assistance. It was suggested to her that she should have taken additional reasonable measures to protect her property and she did not disagree with this suggestion.

[66] Finally, she stated that she and her family had since left the area because they felt that ‘*they did not belong*’ and they felt unsafe. She received a number of threatening anonymous telephone calls and feels she was ‘*driven out*’ of the area. She was angry at the community and at the police.

Professor Snyman

[67] She is a professor of law at the University of South Africa. She gave evidence solely in connection with an ‘*academic view*’ on the duty of the police to act in accordance with their constitutional mandate. In her considered view, the non-performance of the police to, inter alia, protect damage to private property, may lead to a position of anarchy.

Colonel Bezuidenhout

[68] Now retired from the police, he was called as an expert witness. He was a member of the police for some (36) years and has specific expertise in the area of crowd management. He obtained a diploma in police administration at a relatively young age and has a wealth of experience, specifically in crowd management. He received extensive training both locally and abroad.

[69] He was taken through the various pieces of legislation in South Africa that find application when it comes to ‘*public order policing*’ as well as crowd management. He testified that over the years and particularly in the last (14) years, the role of public order policing has dramatically changed. The priority now in our country is that of ‘*crime*

prevention' and crowd management and control has now been relegated to a secondary function within the police.

[70] In his view, the '*information gathering process*' during this period, was insufficient on his reading of the documentation discovered. Further, his main criticism was that the role players in control did not maintain a '*hands on*' presence during the protest action. Further, no operational plan was established and implemented and there was no evidence of proper pre-planning. He conceded that a number of localities had to be monitored simultaneously, but at the very least, according to him, a proper briefing should have been undertaken at the inception of the operation, so as to curb the protest action.

[71] The defensive measures that were put into place were also insufficient. No reserve unit was in place. The occurrence book entries do not reflect that the JOC²⁸ was fully operational. The vehicle operational diaries and occurrence diaries were not accurately kept and some of the entries were superficial in nature. A formal de-briefing process should have taken place firstly in PAH, thereafter at cluster level, and finally at provincial level. The discovered records reveal no evidence of this process ever having properly occurred.

[72] He testified about the two different models for '*public order policing*' that were applicable in South Africa, namely the '*French Model*' and the '*Belgium Model*'. The former adopted a '*close contact*' approach towards crowd control, whilst the latter model adopted a '*fighting distance*' approach. The situation at PAH during this time, should have been categorized as a level (3) situation. Insufficient members of POPS and VISPOL²⁹ were

²⁸ Joint Operational Centre

²⁹ Members of the Visible Policing Unit

deployed by the police. Reference was made to various police documents³⁰, completed at the time. These documents exhibit the posting and location of each member of the police and indicate exactly what equipment has been issued to each member. According to Colonel Bezuidenhout, both insufficient personnel and equipment were deployed during these protests.

[73] One of the main criticisms levelled by him was directed towards the alleged lack of intelligence gathering. Further, the information that was gathered was not properly analysed so that it could be utilized in the pre-planning phase. In this context, the concept of ‘*situational appropriateness*’ becomes critical, especially when any protest action is spontaneous or unplanned. Further, depending on the intelligence gathered a gradual proportional response may be required to a gradual escalation of the protest action.

[74] Colonel Bezuidenhout referred to the police ‘*Code of Conduct*’, as well as to the ‘*Conduct and Morals*’ code of the police, with specific reference to the keeping of ‘*pocket books*’ by members of police. In his view the record keeping was not properly adhered to in the circumstances of this protest. Reference was also made to a number of ‘*contingency plans*’ drawn up during this period, in order to manage the unrest in the PAH area. Colonel Bezuidenhout was of the view that these contingency plans were not properly drawn up and were as he put it, amounted to a ‘*cut and paste*’ effort in the circumstances.

[75] More defensive measures should have been put into place and additional POP’s members should have been sent to PAH. He was critical of the fact that he was unable to establish that a sector commander was engaged at PAH, with the result that there was no

³⁰ SAP 15 - documents

liaison with the community and also no media liaison officer. Most importantly, he could not find any evidence of a ‘*commanding officer*’ on the ground.

[76] It is so that an electronic occurrence diary was kept by the Ceres cluster, which showed that during the period from the 13th to the 14th of November 2012, more than (12000) people participated in these protest actions.

[77] According to the information obtained from the various occurrence books, in his view, Major Truter³¹, should have been in PAH and not in the ‘*Tandfontein*’ area. He expressed the view, that this area received preferential treatment because it was controlled by DTG.³² This was the same group that owned DTS in PAH where the police were stationed during the protest action.

[78] A number of video clips were shown to the court of footage taken by police on the 13th of November 2012 of the protest action in PAH. According to Colonel Bezuidenhout, this material exhibited, inter alia, the following:

[78.1] *No police member seemed to be in command of the situation in PAH.*

[78.2] *Initially, only one member from POPS was deployed to the scene.*

[78.3] *No leadership seemed apparent and the position taken up in WBA by the police was incorrect.*

³¹ The person who was – *operationally* - in charge at the time

³² The Du Toit Group of Companies

[78.4] *The police adopted the 'Belgium Method' of crowd control and in his view, the 'French Method' of close contact with the protestors should have been adopted instead.*

[78.5] *Warrant Officer Jones was the only member of POPS on the scene and he should have called for the use of water cannons together with 'six coiled' barbed wire to prevent the protestors from causing damage to the plaintiffs' properties.*

[78.6] *The dam located nearby should have been used as a natural barrier and also the deep ravine, that separated the housing projects in the immediate vicinity.*

[78.7] *Finally, he levelled criticism at the fact that a number of police attended a meeting with the local community in the area, whilst in his view, some of these police should have remained at the scene in PAH.*

[79] In his view, the police did not do enough to protect the plaintiffs' premises as they left a skeleton police deployment at PAH. According to him this re-deployment of the police amounted to a tactical error. During this time, the DTG required assistance in connection with the transportation of workers and this assistance was provided without hesitation. The result was, that the remaining threat at PAH was mis-interpreted by the police on the ground.

[80] Further, the available records show that during this time, no less than (824) rubber bullets were fired, (5) stun grenades were launched and (1) tear-gas cannister was discharged. After this, the police stationed at PAH seemed to have run low on ammunition and equipment due to inadequate planning.

[81] The conclusions by Colonel Bezuidenhout are, inter alia, the following:

[81.1] *No de-briefing reports were made available so it is difficult for him to express a definitive view, but nevertheless, he opines that there was no proper operational plan and the JOC was not in place to give proper instructions.*

[81.2] *The police resources were not managed properly and efficiently and the JOC and the CJOC should have been more involved in this process.*

[81.3] *The intelligence gathering and the dissemination of the information available was not up to the required standard and this, in turn, had a detrimental effect on the risk assessment of the situation on the ground at PAH.*

[81.4] *Too few POPS and VISPEL members of the police were deployed and the 'execution' by the members of the ground, was insufficient for the threat faced at the time. There was a lack of decisive intervention by the police and the leadership was poor.*

[81.5] *The 'French Model' of crowd control should have been adopted and the police should have taken control of WBA 'lower down' at the first intersection.*

[81.6] *The plaintiffs specifically requested the police to assist and these requests fell on deaf ears. They should have protected the plaintiffs' property.*

[82] Colonel Bezuidenhout was asked to comment on the amendments effected by the plaintiffs to their particulars of claim. In his view, when the unrest started in 'De Doorns' a

JOC was required to assess the threat. This, fell to be escalated to provincial level for planning and action.

[83] In summary, the effort by the police was not good enough in the circumstances. A number of POPS members were available, but were not deployed. Also, the members that were deployed, were not sufficient.

[84] During cross-examination, a more detailed map of the area effected by the protest action during this time was entered into evidence.³³ Colonel Bezuidenhout conceded that his role was to give evidence in favour of the plaintiffs in accordance with his brief.

[85] The last time that he was actively involved in '*crowd control policing*' was more than a decade ago, other than in a supervisory role during the Soccer World Cup tournament. He was driven to concede that, despite his vast experience in crowd control, he had never experienced the '*scale and extent*' of the protest action as it played out in the Western Cape during November 2012. He agreed that the protest action was wide-spread and occurred over at least (4) clusters.³⁴

[86] He conceded that the police had to cover a vast area and their primary focus was on the farm workers, essentially about wage disputes. Wide scale destruction occurred over a large area, mostly consisting of farm properties and vineyards. Many farm workers were intimidated during this time.

[87] Colonel Bezuidenhout had never before encountered such large scale destruction taking place in so many areas simultaneously and, what occurred was on an unprecedented

³³ Exhibit G

³⁴ A cluster typically consisting of between 6 and 7 police precincts

scale. To make matters worse, these protest actions were spontaneous in nature. It was an abnormal situation, inter alia, because of the vastness of the situation, the lack of available manpower, the lack of intelligence and the general lack of resources. Further, the level of violence and destruction in urban areas was far more serious and generally softer in rural areas. He agreed that this was a huge challenge for the police in the circumstances.

[88] He agreed that the protesters did not send out any notices in terms of the applicable legislation and that the police were not able to prepare adequately for these protests and were somewhat taken by '*surprise*'. The police did not have the luxury of preparing properly in terms of the appropriate legislation. Despite this, in his view, there should have been a deployment of more police resources to the area and basic operational and contingency plans were not implemented. In his opinion, the intelligence gathering was particularly insufficient. He conceded that the police were under resourced in the Western Cape.

[89] Colonel Bezuidenhout was of the view that every single decision made by the police was incorrect and not one strategic decision was taken correctly. He did however concede, that this was on the basis of a perusal of the documents placed before him in isolation, without speaking to any members of the police '*on the ground*' at the time. He conceded that had he indeed spoken to certain members of the police, his opinion may have been different.

[90] A further concession was made to the effect that there may indeed have been intelligence gathering by the police, but because this was not recorded in the documents he perused, he made the assumption that there was no intelligence gathering by the police. He agreed that if certain actions were not recorded, it did not necessarily mean that these actions by the police never took place.

[91] In my view, he unnecessarily criticised the fact that the alleged kingpin ‘*Mr Petersen*’ was not arrested on charges of public violence and interrogated. He opined that the formation of the PJOC³⁵, was a positive step and that it was appropriately manned by very senior members of the police. According to him, there was no proper operational plan. He originally testified that the contingency plan consisted only of a record of all the people involved with their contact numbers, together with a list of the resources available. Later, when pressed on this score, he testified that this contingency plan also set out the threats and potential threats linked to the protest action.

[92] He was confronted with a copy of the ‘*operational plan*’ during cross examination, but opined that this document was not an operational plan as it was not signed by the CJOC. This qualification, he never made before and seemed to be in conflict with his expert summary. He agreed that no prior notices were given in connection with this protest action in that these protests were all spontaneous events.

[93] Further, he agreed that the services of the fire brigade was very limited and stretched during this period as a number of towns were totally dependent on the nearby town of Ceres for these essential services. Further, and most significantly, the structures that were set alight during this time seemed to have been at the hands of the occupants of the phased developments who lived in close proximity to the industrial area of PAH.

[94] Finally, it was drawn to his attention that air support was requested by the police during this time and that no less than (15) towns had to be serviced and managed by the air

³⁵ Provincial Joint Operation Centre

support that was provided to the police. In addition, high ranking police officials with vast experience were dispatched to the area, during this time.

[95] Colonel Bezuidenhout conceded that he was not personally aware of the planning and intelligence undertaken by the police and that he had based all his opinions on the documents placed before him, taking into account, inter alia, his training and experience. In his view, if an event was not adequately documented then that event, did not occur. It was suggested to him that he was mistaken in his view that the police gave preference to protecting the properties belonging to a specific group in the area. It was suggested to him that this opinion as based solely on the fact that because a certain group suffered less damage than another group, that this did not necessarily mean that the police showed a preference in their policing of the area.

[96] It was further pointed out to him that the DTG spent approximately (3.4) million rand on their own private security during this time and despite this, they in any event suffered damages in the region of (25) million rand. Significantly, in the areas, where many members of the police were indeed operational, the DTG suffered damages to the sum of about (4.8) million rand.

[97] This notwithstanding, he maintained, that in his view, the situation on the ground regarding the protesters should have been regulated and governed in accordance with the Gathering's Act³⁶. He was challenged on this aspect, in that, inter alia, he was referred to an official police policy document³⁷, from which it became apparent that there was a definite

³⁶ The Regulation of Gatherings Act, Act 25 of 1993

³⁷ Dated 2011

‘*shift*’ with regard to the training methods, manuals and procedures in connection with crowd control by the police.

[98] In line with this shift, the police adopted an ‘*appropriate response policy*’ which emphasized the use of less restraint to crowd control. In summary, the response by the police allowed for more discretion to be exercised, taking into account the various policy directives and the appropriate legislation. It was conceded that the function of crowd control required a large amount of individual discretion to be exercised as every situation is different. The police were often obliged to make judgment calls and there were definite specific rules to be applied to a situational approach. Further, the focus of the protest action by the farm workers was directed towards farmers in connection with demands for an increase in their minimum wages and the protests were not focused towards factories and industrial concerns.

Premier Zille

[99] She was the premier of the Western Cape during this time. She enjoyed an oversight role and she went to ‘*De Doorns*’ on the 8th of November 2012 in order to attempt to negotiate with the protestors. She addressed a large crowd of people at a local sports field. She expressed the view that the issues by the farm workers had regrettably become ‘*politicised*’ and it was clear that she was not welcome and she left due to fears for her safety. On the 14th of November 2012, she sent an urgent letter to the State President in which she indicated that, according to her, the police needed urgent support and reinforcements to control and manage the protests in the Western Cape. Co-incidentally, the protest action was suspended on the afternoon of the 14th of November 2012 as an agreement had been reached

with the protesting workers in that they would return to work on the following day, being the 15th of November 2012.

Mr Mathee

[100] He is an insurance broker in Ceres and the owner of '*RSA Brokers*' and he has been an insurance broker for at least, the last (29) years. The first and second plaintiffs are his clients. On the 7th of November 2012, he received a call from an '*Agricultural Organization*' in the area to the effect that he should consider securing his clients' with additional *SASRIA* insurance, in view of the impending protest action in the area. Upon enquiry, he established that the first plaintiff had the necessary insurance in place. He subsequently arranged for additional insurance for the second plaintiff.

[101] He testified that he went to the premises of the second plaintiff on the 13th of November 2012, and thereafter to the premises of the first plaintiff on the 16th of November 2012. At the second plaintiff's premises, he observed that the premises were still smouldering and in his view, the second plaintiff's building had been torched from the inside. He proceeded to the premises of the first plaintiff on the 16th of November 2012. Shortly, after his arrival, he was requested to leave the premises by the police as protestors were still in the area. He was requested to provide details of all the insurance claims submitted by the plaintiffs and undertook to provide the relevant information, as requested, to the defendant's legal representatives. This information was seemingly more relevant to the issue of quantum which had been separated out, by agreement.

THE DEFENDANT'S WITNESSES***Mr Visser***

[102] Mr Visser testified that he previously worked for the fire department and during this time, he was based in Ceres. He was in charge of an extremely vast area and PAH fell within his jurisdiction. PAH did not have its own fire station and the closest fire station was situated in Ceres. Their operation worked through the medium of a '*call centre*' and priority was given according to this system. When these incidents occurred, it was unfortunately at the height of the fire season and the resources at their disposal were limited. The situation at PAH was a volatile and explosive situation and they to be escorted by the police in view of the many protests in the area.

[103] He testified that it was about (10) km from Ceres to PAH and that this trip would ordinarily take approximately (10) to (15) minutes, depending on traffic volumes. He confirmed the existence of a trench across WBA and that it was difficult if not impossible to traverse this trench with a vehicle. During this time, his personal service vehicle was damaged by the protestors and had it not been for his '*smash and grab protection*' on the vehicle, he could have been severely injured by the protestors. He confirmed that with the aid of the police he attended upon the premises of BMF and HSF. It was however extremely difficult to access these premises and their resources were stretched at the time. Further, according to him the violence and destruction at the hands of the protestors was unprecedented.

Mr Groenewald

[104] He testified that he had been in the employ of the fire department, as an officer, since 1985 and was initially stationed in Stellenbosch. During November 2012, he was employed as an operational officer with the fire department in Ceres. He recalls that he did attend upon the premises of BMF³⁸, at a time when these premises were burning. They approached the premises by utilising a gravel road at the back of the premises. They did extinguish part of the fire burning at the time, but had to leave as the protestors posed a threat and they left the area due to safety concerns. He further recalls that on another occasion, he went back to the premises of BMF so as to extinguish some further fires. On this occasion, they entered the area via WBA. They also extinguished a fire burning at the premises of DTS.

Mr Lamoer

[105] He was the former Provincial Commissioner of the police in the Western Cape. He retired in November 2015. He held daily meetings with all the stakeholders and delegated a great deal of the ‘*operational responsibility*’ in this matter to Major General Jacobs, who was the ‘*Deputy Provincial Commissioner of Operations*’ during this time.

[106] Members of POPS were deployed to a number of different areas and he in turn, with the help of senior management, on a regular basis, assessed reports received from his operational members and the intelligence community. Personally, he had never been involved

³⁸ During the day upon a date which he was unable to recall

in managing a farm workers protest and this prompted him to meet with the community leaders in the area. The command centre, consisted of a '*War Room*' situated in Cape Town. All the information received was collated and assessed and their decisions, in turn, were then relayed to the various role players and enforcement agencies, including the intelligence community.

[107] The area that needed to be monitored was vast and consisted of no less than approximately (300) farms. In addition, the police resources were stretched as the protests were spontaneous and not planned. He relied heavily on information received from '*Crime Intelligence*' and the police operations were to a large extent, of necessity, re-active by nature.

[108] In addition, he held discussions with Mr Opperman³⁹ and also with Mr Peterson, who represented some of the farm worker union organizations. He pertinently communicated to Mr Opperman, to advise the farmers in the area to increase their security in order to protect their property.

[109] He explained that the deployment of the military forces in circumstances such as these, was extremely expensive and the final decision in this connection vested in the State President. According to him, there was no need to deploy any military forces because, according to the intelligence reports received, the situation had been contained. Further, and in any event, this would take a long period of time, with the usual financial and logistical complications attached to the deployment of the military forces. Further, according to him, Premier Zille had no experience as an operational commander and she was not in a position

³⁹ Representing the majority of the farmers in this region

to make any decisions as to whether or not, further resources and the military forces, should be deployed.

[110] He agreed that the police had a duty to act within our constitutional framework and that the preservation of life was always more important than the preservation of property. He further explained that in his view, the '*Operational Commander*' on the scene, had an overriding discretion to make operational decisions, particularly in the circumstances of unplanned protest action. Such authority, would include decisions on how to deploy resources on an urgent basis depending on the threat assessment. Furthermore, the protest action initially had nothing to do with factory owners and in his view the destruction of the various factories in PAH was as a result of pure criminality by the perpetrators.

Mr Annandale

[111] Colonel Annandale testified that he is a Major General in the police. He is stationed at the National Office of the police and he is in charge of operational support. He has extensive experience in the mobilization of forces within the police, both nationally and internationally. He has some (37) years of experience and he also enjoys experience in the field of hostage negotiation, crowd management, riot control and internal stability issues.

[112] One of the constant challenges within the police is the issue of the deployment of resources and the ever increasing costs of providing these resources. In preparation for the Soccer World Cup, the VISPOL section of the police were also trained in certain aspects of crowd management as '*first responders*'. Thereafter, it became compulsory that all members of the police completed some sort of crowd management training during their basic training.

[113] During the years following, a new philosophy was introduced within the police to move away from the strict application of '*Standing Order 262*'.⁴⁰ A new policy document was created with a view to establishing operational guidelines for crowd control and this new policy document did not mean that the provisions of SO 262 were rendered obsolete, but rather that some of these provisions became somewhat diluted. According to Colonel Annandale, the priority of the police is always to protect life over property.

Mr Jacobs

[114] Mr Jacobs testified that he has been in the employ of the police for the last (24) years. He is now the National Head of '*Crime Intelligence*'. During 2012, he was the Deputy Provincial Commissioner for '*Operational Services*' in the Western Cape. He holds the rank of Lieutenant-General. One of his duties was the co-ordinating of the response by the police and the allocation of resources, so as to ensure an appropriate response by the police. He was briefed and was made aware of the situational developments on a daily basis. He received intelligence reports and incident reports every morning. All the police cluster commanders reported to him on a daily basis.

[115] He also met with the community leaders, the farm workers union leaders and also the actual people who represented the farmers in this area. This was all done in order to attempt to obtain a comprehensive picture of the situation in order to deploy the correct resources. He also liaised with crime intelligence, although there was no intelligence about specific

⁴⁰ 'SO 262'

factories that were going to be torched. As a matter of policy, the police do not guard private properties.

[116] He did not feel the need to request that the military services be deployed or to obtain reinforcements from other provinces. The protests occurred over a vast area and the protestors also made use of taxi services to move from area to area. He emphasized that during these difficult times, normal policing still had to take place. It is much more difficult to manage protests that are unplanned, particularly from a logistical point of view. All of these protests happened simultaneously, albeit in different areas. The situation was fluid and well-orchestrated. The destruction was enormous, taking into account, inter alia, the quantum of the insurance claims over this period and the fact that municipal buildings, state owned properties and vehicles were damaged. In his (24) years of experience, he had not experienced protest action taking place over such a vast area of land.

[117] During cross-examination, he opined that the operational system that was put into place was more than adequate and the capacity of the police was sufficient, taking into the account the vast area and the circumstances that prevailed during this time. The main priority was to prevent the loss of life and to stabilize the area, which was accomplished.

Ms Vos

[118] Colonel Vos testified that she had been in the employ of the police since 1984. She was the VISPOL co-ordinator, for the ‘*Winelands Cluster*’. She had a supervisory role and had to manage a vast area. She met with Mr Jacobs as early as the 6th of November 2012 in order to put into operation a ‘*contingency plan*’ for the protests in the area.

[119] She met with Mr Jacobs prior to the protests in order to form a view of what could be the extent of protest action expected from the seasonal farm workers. The focus, according to their intelligence, was the possible destruction of farms. She has never experienced such a large protest action taking place over such a vast area. She was most appreciative of the dedication of the members of the police during this time as many of them worked very long hours beyond their call of duty.

[120] On Sunday, the 11th of November 2012, she met in Ceres with Mr Truter and a number of reinforcements were sent to PAH. In her view, the police at all times, adopted a situational response based on intelligence and that was re-active in nature.

Mr Stefanus

[121] He is a Captain in the police services and he has (25) years of experience. He is an expert in crowd management and received training, both locally and abroad. In his view crowd management commanders are always obliged to operate reasonably, viewed objectively. In his view, the video footage that was shown to the court was insufficient in that it did not capture a total picture of what happened during this protest action.

[122] In his view, the police correctly strategically placed themselves in WBA for a specific purpose and their objectives in this connection were achieved. The protestors were armed and sought confrontation with the police and that is why they, inter alia, dug the trench to obstruct the police. There was no clear information on what factories would be attacked as crime

intelligence suggested that it was a protest at the instance of farm workers and that '*farms*' in the area, were going to be destroyed by the protestors.

[123] In the event that the protestors were not contained, then in that event, innocent people could have been injured and the priority is always '*life over property*'. In his view, there was a proper solution in place to address the problems and the risk assessments were adequate. Further in his view, the safety of the police was also an important aspect, which was not taken into account by the plaintiffs' expert.

[124] Significantly, in his view, the protestors on the 12th of November and the 13th of November 2012, were not necessarily the same protestors that caused damage to the plaintiffs' properties on the 14th and the 17th of November 2012, respectively. To have placed the '*Nyala*' at the back of the premises of HSM would not have tactically been a sound decision as , inter alia, it would have been very difficult to extricate the '*Nyala*' should it have been attacked by the protestors. Further, he was of the view that the area was patrolled extensively from the 13th to the 17th of November 2012.

Mr Jones

[125] Mr Jones testified that at that time he held the rank of a Warrant Officer in the police. He has been with POPS since 1990 and has been a policeman for well over (40) years. He was called out to Ceres at 03h00 on the 13th of November 2012. He arrived in Ceres at about 05h45 and commenced with a parade and a briefing. He arrived in PAH at about 06h45 and went to WBA with (3) vehicles, (8) members of POPS, (2) pick-ups and a '*Nyala*' vehicle. They were all armed with full riot gear, tear gas, stun grenades and rubber bullets. They

arrived in WBA at about 07h00. Upon arrival there were approximately (1500) angry protestors present who were intent on entering the town of PAH, via WBA and VTR.

[126] He kept meticulous notes of the events that unfolded, which were subsequently written into an occurrence log.⁴¹ Upon arrival and as soon as they alighted from their vehicles, they were pelted with stones by the protestors. Colonel Truter attempted to negotiate with the protestors, via the medium of an interpreter, but this had no effect. Colonel Truter was removed from the scene as he was not clothed in full riot gear. After the necessary warnings were given, Warrant Officer Jones issued out an order to '*take action*' against the protestors. Tear-gas, stun grenades and rubber bullets were fired at the protestors. The protestors were eventually driven back down WBA. It was a fluid '*push and pull*' process to get the protestors to be driven down WBA. The protestors eventually reduced to about (500) in number. POPS was kept busy for about (18) hours before calm was restored.

Mr Truter

[127] He was promoted to the rank of Major shortly before the protests action in PAH and was the Station Commander in PAH. He was instructed by Colonel Vos to draft a contingency plan in order to prepare operationally for the protest action. The intelligence reports at his disposal did not refer to protest action being directed against factories in PAH. In his view, Warrant Officer Jones and the members from POPS had adequately gained control of the situation in WBA. The situation in PAH was relatively calm during the period from the 14th to the 17th of November 2012, save for the fact the regular patrols and normal complaints were attended to during this period.

⁴¹ This occurrence log was entered in the record as an exhibit

Mr Kayster

[128] He was attached to POPS and had training in crowd control and management and was deployed to the Ceres area on the 11th of November 2012. He held the rank of a Warrant Officer in the police. He initially performed duties in the ‘*Tandfontein*’ and ‘*Nduli*’ areas in order to control the farm workers who were protesting and he was charged with keeping the road secure for road transport.

[129] He was re-deployed to PAH on the 14th of November 2012 and reference was made to an operational diary that he meticulously kept during this period. In summary, the diary showed that he patrolled the area in WBA on regular intervals on the 14th of November 2012 and on a few occasions dispersed unruly crowds that had gathered in the area. According to his recollection, (2) police pick-up vehicles and a ‘*Nyala*’ vehicle were deployed in order to patrol the area in the vicinity of PAH on the 14th of November 2012.

[130] On the 14th of November 2012 and at about 10h30, he together with Warrant Officer September fired a large number of rubber bullets towards the feet of some protestors who had gathered outside the plaintiffs’ properties with the intention of causing damage and looting these premises. They together, managed to disperse these protestors and thereafter patrolled the area until they were called to a meeting at 14h20 in the afternoon. Upon returning from the meeting they again patrolled the area between the hours of 18h30 and 19h30.

[131] During cross-examination, it was suggested to him that he had entered onto the premises of the second plaintiff with a 'Nyala' vehicle on the day in question. He did not agree. As far as he could recall, he at one stage entered onto these premises but he was on foot at the time. He bore no recollection of any discussion with Mrs Hanekom of the second plaintiff or Mr Hanekom of the first plaintiff. He did recall engaging with some person connected to the first plaintiff. He could not remember that a container housing diesel had caught fire in the nearby vicinity on that particular day.

DISCUSSION

[132] It is common cause that the protest action was unlawful as it did not comply with the Gatherings Act.⁴² The protest action was spread across a vast area comprising of no less than (14) towns. The provincial human resources, including visible policing and public order policing units were deployed and re-deployed to the various areas, depending on the fluctuating severity and volatility of the protest action, from time to time.

[133] It is further common cause that the protest action and unlawful conduct on the part of protesters and the criminality in the area, was unprecedented in the history of the Western Cape farming region. Many farmers and businesses engaged the services of private security companies to protect their properties and possessions. In some instances, the fire brigade services could only carry out their duties whilst under police protection.

⁴² Regulation of Gatherings Act 25 of 1993

[134] The plaintiffs allege that the police breached their legal duty and acted negligently and unlawfully, and that as a result of the defendant's negligence in respect of the protest action on the 13th of November 2012, criminality was prevalent in the industrial area of PAH. The damages suffered by the plaintiffs was accordingly as a direct consequence of the negligence of the police at the scene of the protests on the 13th of November 2012 and, thereafter.

[135] The crux of the complaint by the plaintiffs is that as a direct result of the unlawful failure of the police to act positively against the protestors, their movable property and their immovable properties were destroyed and as a result they were unable to continue with the operation of their businesses.

[136] In response to this, the defendant, inter alia, accepts that having reference to section 205(3) of our Constitution,⁴³ and the South African Police Service Act⁴⁴, the police have a general duty to prevent, combat and investigate crime, maintain public order and uphold and enforce the law. However, they advance that during this period, the police instructed the plaintiffs' members and employees to vacate their properties for purposes of protecting their safety and bodily integrity.

[137] I must render a decision on, inter alia, the following issues, namely; whether the police were in breach of their legal duty and whether their conduct in relation to the plaintiffs during the relevant period was negligent and if so, wrongful. If I find that the police were negligent, then in that event, I also need to determine if they were causally negligent in any manner, and if so, was there any contributory negligence on the part of the plaintiffs. Most

⁴³ The Constitution of the Republic of South Africa, Act 108 of 1996

⁴⁴ Act 68 of 1995

significantly, I need to determine '*wrongfulness*' in the context of whether any public or legal policy considerations militate against the defendant being held liable for any damages allegedly suffered by the plaintiffs.

[138] It seems to be common cause that the nature and extent of the protest action, during this time, was unprecedented. The protest action was unlawful and did not comply with the Gatherings Act. The opportunity to put any measures in place and to plan beforehand was accordingly very limited. The co-ordination of the police resources was undertaken of the Mr Lamoer and his testimony, in this connection, was corroborated by Captain Stephanus.

[139] He was placed in an ideal position to engage with the other senior officials so as to co-ordinate the deployment and re-deployment of the VISPOL and the POP members, and the allocation of resources. He in turn, kept the National Commissioner of Police informed on a regular basis regarding the situation in the Western Cape, at this time. In order to support the VISPOL members in the respective towns in the area, VISPOL members from other police stations were deployed. POPS units, with their ammunition, gear and other resources, from George and Paarl were also deployed to the area.

[140] Major roads as well as smaller roads were continuously being barricaded and stones were thrown by protesters at passing vehicles. This posed a significant risk to the safety of people's lives in these areas. Fields were set alight, buildings (including a police station and a municipal office) were set alight. Plant, machinery, and businesses were torched. Petrol bombs were thrown by the protesters and criminal looting and stealing, followed.

[141] Turning now for a moment, specifically to the area of PAH. This policing district consisted of approximately (50) farms and the terrain consisted of open fields, gravel roads, mountains and hills. The area measures (3554) km² in extent. There is a satellite police station at '*Op-Die-Berg*' about (40) km away, but still within its policing precinct. This village also consists of farms, shops and residential homes which, were all placed at risk during the protest action.

[142] The main artery in this PAH industrial zone is WBA as it serves as the main road to the residential phases, the businesses and is also the route utilized to transport a number of farmworkers on an almost daily basis. The BMF property was approximately (8000) m² in extent, while the factory building was approximately (1000) m² in extent. HSF measures no less than (2.1) hectares. In turn, the DTS premises was much larger than the BMF premises and was easily accessible. There are two unfenced vacant plots adjacent to BMF and CVF. The premises of HSF are also accessible from the informal settlements, which were in close proximity.

[143] On the 13th of November 2012, there were over (60) incidents of protest action in the PAH area, which were typically violent and involved large crowds of protesters. The most significant incident was on WBA. A large crowd of protesters sought access to VTR and into the town of PAH. Taking into account the topography of the area, the police sought to keep the crowd at the far end of the intersection on WBA, with the intention of eventually dispersing them back into their residential areas. A trench in WBA had been dug by the protesters so as to prevent the '*Nyala*' from proceeding further down WBA.

[144] The protesters hurled stones and petrol bombs at the police and WBA was strewn with stones, crates and rocks. CVF was set alight by protesters as well as two forklifts and several crates. Two police members were injured and were evacuated. The staff employed by DTS did not report for work as they were intimidated and they were afraid that their houses may have been torched. Many calls were received at the police station about fires burning and police contacted the fire brigade in Ceres. The schools in the area also closed early and the school children were sent home. The police were on duty at WBA from about 07h00, until after midnight.

[145] The evidence reveals that the protest action had subsided considerably the following day. Early that morning, a crowd of approximately (75) protesters gathered in WBA, but by mid-morning, the crowd had largely dispersed. However, many incidents continued to occur in the area, as well as the other parts of PAH. The police were deployed and re-deployed to attend to those situations, as and when, they arose. During this time, the police also conducted patrols in WBA and in the vicinity of the plaintiffs' factories.

[146] When Mr Hanekom attended upon his premises in the presence of his insurance broker, they were advised to vacate the area as a group of protesters were headed in their direction. It is not disputed that the remaining portion of the BMF was set alight on 17th of November 2012, this in the early hours of the morning. Both the identity of the perpetrators and the circumstances of this destruction, remains unknown. This in my view is a significant fact.

[147] The plaintiffs' case, to a large extent hinges on the evidence tendered by their experts, Professor Snyman and Colonel Bezuidenhout. Professor Snyman's evidence consisted

entirely of an academic opinion and she conceded that she is not a specialist in the field of public order policing.

[148] During cross examination she conceded that she could not give an '*opinion*' on the actual conduct of the police in these particular circumstances. What I am left with is an academic opinion, '*nothing more and nothing less*'. In order for me to properly assess and weigh up the evidence of Colonel Bezuidenhout, other than dealing with certain factual evidence about when the plaintiffs' suffered their alleged damages, I have to bear in mind the following concessions made by him, namely;

[148.1] *that a number of clusters were affected simultaneously, involving (29) police stations;*

[148.2] *that the focus of the protest was aimed at farms;*

[148.3] *that extensive damage was caused during the protest action in many areas;*

[148.4] *that members of the public were intimidated to partake in the protest action;*

[148.5] *that the police were faced with an abnormal crowd management situation, and*

[148.6] *that no notice of the protest action was given to the police and they were caught off-guard;*

[149] He was driven to concede that his opinion was based on documents presented to him and he performed an '*ex post facto*' reconstruction of what happened, this after having held discussions with the plaintiffs' legal team. Further, that the protest action of the 13th and 14th of November 2012, emanated from the nearby residential areas and by that stage no substantial damage had been suffered by the plaintiffs. These concessions must be holistically

viewed within the factual matrix of the position on the ground at PAH after the 13th of November 2012.

[150] Whilst the test for negligence is trite and is an objective test as set out in *Kruger*,⁴⁵ the important elements of the ‘*delict*’ which require scrutiny in this case, are the elements of wrongfulness and causation. The enquiry is whether the alleged harm caused to the plaintiffs demands the imposition of liability in these particular circumstances. This is case-specific.

[151] In *Loureiro*⁴⁶, the Constitutional Court expressed the wrongfulness enquiry, inter alia, as follows:

‘The wrongfulness enquiry focuses on the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on a duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability’

[152] In my view, it must be accepted, as a starting point, that where positive conduct harms the person or property of another, such conduct is ‘*prima facie*’ wrongful. Significantly, for the purposes of this case, the negligent causation of ‘*pure economic loss*’ is not regarded as *prima facie* wrongful.⁴⁷ There is no general right not to be caused pure economic loss.⁴⁸ In considering whether there was a legal duty on the defendant, on the facts of this case, I must have regard to public and legal policy considerations consistent with our constitutional norms. It is not the reasonableness of the conduct of the police which requires scrutiny, but

⁴⁵ *Kruger v Coetzee* 1996 (2) SA 428 at 430

⁴⁶ *Loureiro and Others v Invula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) at para [53]

⁴⁷ *Trustees Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* 2006 (3) SA 138 (SCA)

⁴⁸ *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 833A-B

rather it is the reasonableness of imposing liability on the defendant, on the facts and circumstances of this matter, which falls to be determined.

[153] This cannot be determined with reference to my idiosyncratic views. I must also, at the same time consider the issue of causation, both factual and legal, the latter going to the issue of the *remoteness* of the loss.⁴⁹ The issue of remoteness is inextricably linked to the issue of wrongfulness as this is also determined largely by considerations of public or legal policy. Thus, even where negligent conduct resulting in pure economic loss, is for reasons of policy, found to be wrongful, it may, for other reasons of policy, be found to be too remote.

[154] From a policy consideration perspective, the enquiry in the circumstances is, *inter alia*, if it would be overly onerous and burdensome to hold the police liable in circumstances where they have to contend with different protest related incidents which occur simultaneously in different towns.⁵⁰ Wrongfulness typically acts as a brake on liability, particularly in the areas of the law of delict where it is undesirable or overly burdensome to impose liability. I must also be mindful of the fact that protest-related incidents are almost a daily occurrence in South Africa. The police could potentially suffer indeterminate liability should every property owner seek to hold the police liable for damage to their personal property, where spontaneous unlawful conduct is perpetrated and in circumstances where the police are unable to concentrate their resources at a particular business or property, as required, at any given time.

[155] Where the conduct of the police, takes the form of an omission, special policy considerations come into play. The police were not responsible for '*setting in motion*' the

⁴⁹ *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-G

⁵⁰ *Bowley Steels (Pty) Ltd v Dalian Engineering (Pty) Ltd* 1996 (2) SA 395 (T) at pp 399 – 400

damages that caused the plaintiffs losses. Rather, it was the conduct of the protesters and a criminal element which set in motion the plaintiffs' losses.

[156] In regard to the issue of 'vulnerability to risk', it is evident that on the plaintiffs own version that they protected their interests by taking special insurance cover against unrest or riotous situations. The first plaintiff and the second plaintiff were indemnified for their losses by SASRIA⁵¹ in the amounts of R 8046, 213.00 and R4055, 364.00, respectively.

[157] In the case of *Za v Smith*⁵², Brand JA stated the following;

'What it essentially lays down is the enquiry – in the case of an omission – as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard, this court has said on more than one occasion that the application of the 'but-for test' is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued'

[158] It remains undisputed that whatever happened in WBA when the properties of the plaintiffs were damaged, these were not isolated incidents confined to a particular area and restricted to a particular date. The destruction of CVF occurred under extremely challenging circumstances as the police were faced with a fine balancing act of either protecting property or protecting the lives of persons. In my view, the events that unfolded in WBA on the 13th of November 2012, cannot be causally related to any damages suffered by the plaintiffs. This is

⁵¹ The private insurance that they had for riots and unrests

⁵² 2015 (4) SA 574 (SCA) at 589D - G

because the facts do not support such a finding. The plaintiffs also wisely abandoned the theory that the police gave preferential treatment to the DTG.

[159] I say this also because, it is on the 14th and 17th of November 2012, that the first plaintiff's factory was damaged and some of the content stolen. It is also on the 14th of November 2012, that the second plaintiff's property, was damaged. Counsel for the plaintiffs, wisely conceded that the conduct of the perpetrators on the 14th of November 2012, was more in the nature of '*sporadic criminal*' activity. Bearing in mind that on the 14th of November 2012, the police were not faced with a crowd management situation at all. Furthermore, it is unclear from the evidence presented, as to the precise manner as to how the plaintiffs' properties were torched on the 14th November 2012. It is also not known as to the manner in which the first plaintiff's property was torched on the 17th of November 2012.

[160] It was common cause that plaintiffs' properties were easily accessible by criminal elements. The locality, size, and topography of the area where the plaintiffs' properties were situated made the task of the police very difficult. The deployment of the police in a single place was simply not an option, this due to all the spontaneous events and the areas in which the various incidents arose.

[161] On the 14th of November 2012, the evidence in respect of the role of the police and its presence indicates that they were present patrolling and it is apparent that the safety of the lives of persons was of primary concern to the police. Further, the police were not tasked with fire prevention and fire combatting duties and it would have served no purpose had the police entered onto the BMF property, while it was burning. The police are not trained and tasked

with the duties of dowsing fires and the plaintiffs did not join the fire services as a party to their action.

[162] In the early hours of the 17th of November 2012, the BMF property was once again burning. No protest action took place at this hour. In my view, it could not have been reasonably expected of the police to be present especially if one has regard to the background and factual matrix relating to this matter. As far as the second plaintiff's premises are concerned, the video evidence indicates that criminals entered the factory and set it alight whilst they were inside. The evidence certainly does not indicate that protesters or criminal elements were actively in the process of setting the plaintiffs' properties alight in the presence of the police and that the police took no reasonable steps to prevent the protesters from setting these properties alight.

[163] In applying the general approach to causation, factual causation is the starting point, and the tool for establishing factual causation is the '*but-for*' test.⁵³ This involves a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant.

[164] The common law test has never been applied inflexibly but has always recognised that sometimes '*common sense*' may have to prevail over strict logic. Legal causation in turn involves the question of whether there is a sufficiently close relationship between a factual cause and the loss.

[165] Legal causation is the '*conduit*' for policy considerations and, in particular, guards against liability in an indeterminate amount for an indeterminate time to an indeterminate class.⁵⁴ The proximate effective cause must be identified if there are two or more possible causes.

⁵³ Lee v Minister for Correctional Services 2013 (2) SA 144 (CC) at para 40

⁵⁴ Country Cloud Trading CC v MEC, Department of Infrastructure Development 2015 (1) SA 1 (CC) at para 24

[166] Applying the ‘*direct consequences criteria*’ of causation, I cannot on the evidence before me, make a finding that the loss suffered by the plaintiffs followed directly from the positive conduct or any omission by the police. Further, if I apply the ‘*but for test*’ of factual causation, undoubtedly, the failure of the fire services to assist the plaintiffs either ‘*caused or contributed*’ to the losses suffered by the plaintiffs.

[167] The undisputed evidence is that it is not the policy of the police to guard premises. As a rule, the police did not guard individual premises during protest action unless the premises are designated as a ‘*key-point*’. The action of the police will always be the product of judgments made in conflict situations which cannot always be submitted to strict and inflexible rules. Whilst it is so that the defendant was under a legal duty to act positively to prevent harm to the plaintiffs, it is also reasonable to expect the defendant to have taken positive measures to prevent the harm.

[168] I have to make a judgment based, *inter alia*, upon the perception of the legal convictions of the community and on considerations of policy, in determining whether it was *reasonable* to have expected of the defendant to have taken positive measures to prevent the harm. Whether a legal duty exists in a particular case, is thus a conclusion of law depending on a consideration of all the various circumstances.⁵⁵

[169] Put in another way, I am enjoined to decide whether or not the community regards a particular act or omission as wrongful. The legal convictions of the community, in this context, are the legal convictions of the legal policy makers, such as the legislature and

⁵⁵ Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC) at para -7

judges.⁵⁶ The approach to the question as to whether a particular omission to act, should be regarded as unlawful, is an ‘*open ended and flexible*’ approach, taking into account the norms and values, constitutionally infused.

[170] The element of wrongfulness is less straightforward and more contentious when dealing with liability for negligent omissions and for negligently caused pure economic loss.⁵⁷ The plaintiffs’ claims against the defendant are based on alleged negligent omissions on the part of its employees. The determination of the unlawfulness or otherwise of a ‘*negligent omission*’ occurs only in circumstances where the law regards it as sufficient to give rise to a legal duty so as to avoid the negligently causing harm. This enquiry is a very broad one in which all the relevant circumstances must be brought into account.⁵⁸

[171] I am of the view, having considered the issues of wrongfulness and causation, that policy considerations in these circumstances militate against a finding in favour of the plaintiffs. In my view, the police did not act wrongfully, taking into account the undue demands that were placed upon them in these circumstances. Even if I am wrong on this score, I also find that the plaintiffs failed to establish that the damages suffered by them, followed directly from the conduct or omission by any member of the defendant.

[172] In the result, the following order is made;

[172.1] **That the plaintiffs’ claims are dismissed.**

⁵⁶ Van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA) at page -395 para - 9

⁵⁷ Trustees, Two Oceans Aquarium Trust v Kantey and Templer (supra) at page 144 para -10

⁵⁸ Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA) at 1056 G - H

[172.2] **That the first and second plaintiff, jointly and severally, the one paying the other to be absolved, are liable for the defendant's costs (inclusive of the costs of two counsel), on the scale as between party and party, as taxed or agreed.**

WILLE, J