

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: 1100/2014

In the matter between:

JEANETTE JACK

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

BESHE J:

[1] This is a matter that concerns a claim for damages in respect of injuries suffered by the plaintiff on the 15 August 2012.

[2] As a result of admissions and agreements between the parties, the issues that are in dispute were narrowed down to the allegations that appear from paragraphs 4 and 5 of plaintiff's amended particulars of claim. Those allegations are the following:

"4. On or about 15 August 2012, and on, at or near Bantom Road, Kwanobuhle, Uitenhage, a member of the South African Police Services ("SAPS"), whose further particulars are unknown to the Plaintiff, wrongfully and unlawfully, and intentionally, shot the Plaintiff with a rubber bullet / projectile which struck her above the right eye, alternatively, unlawfully and negligently, discharged a

firearm, discharging rubber bullets / projectiles, in the direction of the Plaintiff, and in so doing the Plaintiff was shot above her right eye, as aforesaid.

5. In respect of the alternative claim, the said member of the SAPS acted negligently and unlawfully in that when he discharged his firearm he knew, alternatively, should have known:

5.1. of the presence of the Plaintiff;

5.2. that the Plaintiff could be struck by the rubber bullet / projectile so discharged from the said firearm, by the aforesaid member of the SAPS, if he discharged the same in the direction of the Plaintiff;

5.3 that the Plaintiff would be injured if struck by the said rubber bullet / projectile."

[3] Aspects that are not in dispute between the parties are *inter alia* the following:

The incident in question occurred at Bantom Road KwaNobuhle, Uitenhage. During that incident the plaintiff suffered injuries to her right eye with consequent injury and trauma to her right eye including internal injuries. The injury included intraochia haemorrhage, bleeding, dislocation of the lens of the eye as well as a laceration on the right brow area. The quantum of damages was conceded / admitted by the defendant, namely that the plaintiff suffered damages in the amount of R204 968.56 in respect of the following heads of damages:

Past hospital and medical expenses : R40 558.56.

Future hospital and medical expenses : R14 400.00.

General damages : R150 000.00.

It was also admitted that the defendant is vicariously liable for the conduct of its employees (should it be found that plaintiff's injury was caused by any of its employees).

[4] It is apparent from paragraph 4 of plaintiff's amended particulars of claim that plaintiff alleges that she suffered the injury to her right eye as a result of being shot at by a member of the South African Police Service (an employee of the defendant).

[5] Defendant pleaded as follows to these allegations:

"3.1. It is denied that a member of the South African Police Service ("SAPS") wrongfully and unlawfully, and intentionally, alternatively, negligently discharged a firearm, discharging rubber bullets / projectiles in the direction of the Plaintiff and in so doing the Plaintiff was shot above her right eye.

3.2. 3.2. Defendant pleads that:

3.2.1. Members of the Public Order Policing Unit of SAPS ("POPS") attended to a scene of a riotous crowd;

3.2.2. The riotous crowd threw stones at the Police and in other directions;

3.2.3. In order to control riotous crowd and disperse them, the POPS threw stun grenades and CS grenades at the riotous crowd;

3.2.4. Plaintiff was injured with a stone which was thrown by an unknown member of the public and/or riotous crowd."

[6] In support of the plaintiff's case the following witnesses testified: The plaintiff, her son **Mr Bongani Jack**, **Mr** and **Mrs Matayi** as well as one **Mr Vuyolwethu Tose**.

[7] Warrant **Officer Felix** testified on behalf of the defendant.

[8] It is common cause that after the incident, the plaintiff's injury was examined and assessed by the parties' ophthalmic surgeons, **Doctors Gardner** and **Ngxukumeshe**. Both were of the view that plaintiff's injuries could have been caused by either a rubber bullet of a stone.

[9] Common cause is also the fact that there was a demonstration in the vicinity of Bantom Street on the day in question. Where the parties diverge is as regards the *inter alia* the nature of the demonstration or "toyi-toyi".

Plaintiff's case

[10] Plaintiff testified that on the day in question she drove to Bantom Street in order to check on the progress made with her sofas that were being upholstered by **Mr Gomma-gomma**. In the car with her was her son **Bongani Jack**. As she was driving down Bantom Street she noticed a group of people standing at a corner and one person appeared to be addressing them. Not far from where the group had assembled, there were some police officers as well as a police van and casspirs. She noticed that the police were armed with firearms which she described as guns "that were not small", "long guns". She drove past the group and the police who were opposite each other without any incident. On the way back from **Gomma-gomma's** she once again drove through Bantom Street the same part she had traversed going to **Gomma-gomma**. This time she observed that the police were firing towards

group of people using the big guns they were carrying. The crowd was running in all directions. Most people ran into nearby homesteads. She also observed that there was teargas smoke as some of the people were running past her vehicle. Fearing that the teargas will cause her an asthma attack, she stopped the motor vehicle and asked **Bongani** to take over driving. She could feel her chest tightening. She alighted from the motor vehicle in order to change positions with **Bongani**. As she was going around the car towards the passenger seat, she was struck by a rubber bullet on her right eye. At that stage the police were positioned in front of her vehicle. **Bongani** hid behind the motor vehicle door as they could hear loud sounds going off which she described as bullet sounds / sounds of bullets. **Bongani** later managed to help her into the motor vehicle and drove to where the police were. Upon reaching the police, they both reported that she had been struck by a rubber bullet. One of the officials said an ambulance would be summoned. Later changed to say because she is bleeding they must drive to the hospital. This is the same advice they got at **Doctor Ntlabati's** rooms to which **Bongani** took her. **Bongani** ultimately took her to Cyler Hospital. After being discharged from hospital she reported the matter at Mkoko police station. She denied that she was struck by a stone from the crowd saying had that been the case she would have been struck at the back because the crowd had run past her. Asked during cross-examination whether there was a fruit stall in the vicinity of corner of Bantom and Rocklands streets, she answered that "There was no fruit being sold the M'Lady and for that matter, how would they be selling on that spot? Because on that day in question that place was full of people and it was toyi-toyi". She also denied that the teargas would have prevented her from seeing the police. It was also put to her that that street being a gravel road, it has many stones. She stated that she did not see members of the crowd throw stones at

the police. Plaintiff indicated that simultaneously with being struck on the eye she heard a loud bang. She also conceded that she did not see the rubber bullet that struck her. She was adamant that she did not see anyone throw stones at the police. It was put to her that the police fired teargas canisters and a stunt grenade which made a loud sound. She was not able to comment thereon because she does not know what sound a stunt grenade makes. It was also put to her that police only fired rubber bullets at Ponana Tini Street.

[11] The plaintiff was also cross-examined about the contents of a statement she made to the police in connection with this incident. In her evidence she had stated that when she saw the group of people gathered at a street corner, they were not “toyi-toying”. Regarding the police statement, it was put to her that it reflects that she stated that people were “toyi-toying”. Police were shooting rubber bullets to disperse or stop the “toyi-toying”. She explained that in common parlance “toyi-toying” refers to a group of people who have gathered in a spot (probably for the purpose of demonstrating).

[12] Asked whether it was wise of her to exit her vehicle at Bantom Street at the time that she did, she responded by saying she can hear what is suggested. And that she did not realise she would be struck by a bullet if she did so.

[13] Plaintiff’s evidence was confirmed by her son **Mr Bongani Jack**. He also testified that some of the officers they went past as they were driving to **Gomma-gomma** were wearing bullet proof vests. Around their bodies had what appeared to be bullets straps and some were carrying helmets and some had rifles – big firearms. Driving down Bantom Street from **Gomma-gomma** he observed that

people were running up the street some into nearby houses and there was some smoke. Because of the strong smell of teargas, his mother brought the car to a halt. As far as he could observe the people were fleeing from the police who were firing shots. The police would stop and reload their rifles. He could also hear gunshots going off, but the first sound he heard sounded as if a bomb was going off. After plaintiff stopped the car they both opened their respective doors. He held the passenger door for his mother to get inside the motor vehicle. At this stage when plaintiff was behind the car approaching the passenger's side of the car, he felt something hitting the roof of the car. He took cover behind the passenger door. Plaintiff reached the spot where he was but he could not see that she was unsteady on her feet as she had been struck by a rubber bullet above her eye. She was bleeding profusely at that stage. **Bongani** testified that he saw a rubber bullet lying in a pool of blood next to the back tyre of their motor vehicle on the passenger's side. It was blue in colour. His mother having boarded the car he drove to where the police were and told them his mother had been shot. Plaintiff also spoke to the police. He ultimately took his mother to Cyler Hospital.

[14] During cross-examination the witness denied that the crowd threw stones at the police. Asked if police fired teargas and rubber bullets at a peaceful crowd, he stated that from the debris in the street it appeared as if there had been trouble / commotion earlier. Part of the road was blocked with stones and it appeared as if there had been burning of tyres.

[15] **Mr Vuyolwethu Tose** was another witness to testify in support of plaintiff's case. He testified that he was struck by rubber bullets on the 15 August 2012 on the same day plaintiff was injured. According to him he was struck by seven (7) rubber

bullets, got injured and was treated at the Uitenhage Provincial Hospital. Initially he was treated at Letitia Bam Day Hospital where he arrived approximately 12h00.

[16] **Tose** stated that before the shooting, he was standing at the corner of Singaphi Street with friends watching a group of people who were holding a meeting and awaiting the arrival of a councillor at the corner of Bantom Street. Beyond the spot where the group had gathered there was a contingent of police, some with helmets on. They were armed with rifles and wore belts across their chests with rubber bullets. According to him, this was at about 11h30. He observed a group of people coming from Ketshani Street, others were from Bantom Street. The police moved from where they were in Bantom Street and proceeded towards the crowd which was in the same direction as he was standing with his friends. The crowd of people ran away. It is at that stage that he heard shots ringing. The police were firing the shots. He observed plaintiff's car which he described as a blue Mazda and saw plaintiff (a woman) coming out of the car bleeding and crying. As the witness moved towards Bantom Street he was struck by several rubber bullets that were fired by the police. **Tose** denied that the police only fired shots after the plaintiff had gone to hospital at 13h00. He also testified that he observed four police Hippos at the scene. **Mrs Ellen Matayi** and her husband **Mr Kholekile Matayi** also testified in support of plaintiff's case.

[17] **Mrs Matayi** testified that she did not know the plaintiff and her son before the incident nor did she see them on the day in question.

[18] On 15 August 2012, as is usual every day from Monday to Friday and sometimes Saturday, she set up her fruit / orange vending stall at the intersection of

Rocklands and Bantom Street. She had arrived after 09h00. She got there by driving in a convoy with her husband in their bakkies. After assisting her to unload the bags of oranges her husband left before 12h00 as he was contracted to collect children whose school day ended at 12h00 from school.

[19] Not far from where she was selling oranges was a group of people who were chanting and burning tyres. Not long after her husband left, many police officials in a number of motor vehicles arrived. Some had helmets on, carried rifles, had bullet proof vests (which she described) and wore belts around their torsos with bullets. When police alighted from their vehicles, the group that was gathered there moved away from the spot where they were burning tyres slightly. The police moved towards the group of people assembled there. In order to do so they had to go past her (**Mrs Matayi**). They threw teargas at the crowd and started shooting at them. In turn stones were thrown at the police. In the process the window of her bakkie was struck by a stone. As to what happened up Bantom Street after the police went past her she could not see.

[20] She summoned her husband's help reporting to him over the phone that her bakkies's window had been damaged.

[21] **Mrs Matayi's** evidence as far as it relates to her husband was confirmed by **Mr Matayi**. According to him he left his wife's stall to pick up children who knocked off school at 12h00 and the school was approximately ten minute drive away. He also confirmed that having received the report about damage to her van he drove back to where she was and saw a number of police officials and their vehicles. When he got to the scene the oranges had been loaded back into his wife's van. He

observed that the police had helmets and bullet proof vests, had rifles hanging from their bodies and had belts with bullets across their chests. He described the bullets as long and the size of a thumb and there would be many of them on the belts they had across their chests.

Evidence for the defence

[22] **Warrant Officer Felix** who at the time was attached to Public Order Police Unit, testified that on the 15 August 2012 he was on duty in Uitenhage for duties connected with the demolishing of unlawful structures. Whilst still having a briefing at a shopping complex in KwaNobuhle Uitenhage, they received a report that a group of people were burning tyres at Bantom Road and blocking the road. This was about 09h00. In response to the report, they proceeded to where they found their colleagues from KwaNobuhle Police Station. Having spoken to their colleagues from KwaNobuhle they moved towards a group of people who had gathered at the scene. The group started throwing stones at them. The police in turn threw what **Warrant Officer Felix** referred to as CS and stun grenades towards the group. The group started running into nearby houses but continued throwing stones at them. The police retreated back to where their vehicles were parked. They were then approached by a woman who reported damage to her van. This was next to a fruit stall. The vehicle was apparently struck by a stone from the protesters. They were approached by a second woman who was bleeding and she also made a report about having been struck by a stone on the forehead.

[23] **Felix** testified that at that stage their equipment comprising helmets etc. was still in a Nyala vehicle that they left behind. He denied that at that stage they had

rifles, bullet proof vests and rubber bullets. He denied that any rubber bullets were fired at that stage. Namely at the stage when plaintiff was injured.

[24] **Felix** took the court through the contents of his entries in what he termed “an operational diary”. The relevant entry reads “10:05 departure to Bantom Street where plus minus 200 people were gathered. **Major Magasela** tried to address the crowd nobody wants to speak to **Major Magasela** they are burning tyres and blocking the road they start throwing stones. **Warrant Officer Iverson** threw 2 stun grenades to disperse the crowd, vehicle CPF 765 EC canopy window is damaged. **Jack** is injured with stones which hit her CPH 676 EC white Colt Bakkie” He also read an entry in their occurrence book where it reflects that at 11:45 **Warrant Officer Roberts** takes Casper (no given) and log book to KwaNobuhle. Also reflects arrival at KwaNobuhle at 11:45. **Felix** testified that there was another incident later that they attended to the demonstration and at that stage used rubber bullets to disperse the unruly crowd. But according to another entry not made by **Felix**, it is recorded that at 11:45 at a councillor’s office at KwaNobuhle, stunt grenades and rubber bullets were used to disperse the crowd.

[25] It also emerged from **Felix’s** evidence that POPS’s task is to manage and control crowds, both in public unrest situations and sports events. That it was for that purpose that they were deployed in KwaNobuhle. When they proceeded to Bantom Road it was on the basis of a report that there was burning of tyres, blocking of roads and stone throwing there. **Felix** was however reluctant to concede that was indication that the crowd was aggressive and unruly. He agreed that part of crowd control was to use rubber bullets. According to him, they approached a group of

some 200 people who were throwing stones at them when they did not have any protection gear / clothing.

[26] It transpired during cross-examination that **Felix** and his colleagues fired rubber bullets more than once on that day to repel a group of demonstrators who threw stones at them. He however denied that this happened at the stage when plaintiff got injured.

[27] It appears to be common cause that two days after the incident, after being released from hospital, plaintiff laid a charge with the police complaining of having been shot by the police. **Warrant Officer Felix** deposed to a statement in connection with the incident. He stated that plaintiff reported to him that she was struck with a stone. He also states that it is the stone throwing by the crowd of people they were trying to control continued which led to them (public) withdrawing and climbing into Nyala vehicles. This is however contrary to his evidence that at that stage they did not have their armoured vehicles at the scene.

[28] This is the evidence from which I am required to decide the issue between the parties. Namely, whether the defendant is liable for plaintiff's injury to her right eye? Which will be so if I am satisfied on a balance of probabilities that she sustained the injury as a result of being struck by a rubber bullet discharged by defendant's employee, as opposed to being hit by a stone from the protesting crowd as defendant suggests.

[29] It is clear from what is stated above that the parties' versions are mutually destructive. The technique that is normally adopted by court to resolve factual

disputes is succinctly set out in ***National Employers General Insurance v Jaggars***¹ and ***SFW Group Ltd & Another v Martell Et Cie & Others***² as follows:

“To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’ reliability will depend, apart from the factors mentioned under (a) (ii), (iv) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more

¹ 1984 (4) SA 437 at 440 D – G.

² 2003 (1) SA 11 at 14 1 – 15E / [5].

convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

[30] Applying this technique to the evidence regarding the credibility of factual witnesses, I have taken the following factors into account:

The plaintiff did not claim to have seen the police shoot at her or the rubber bullet that struck her. All she is able to say is that the police were armed with rifles. She heard bangs as they were chasing a group of people who were running towards the direction of her motor vehicle, with some having gone past it. Had she been struck by a stone from stone throwers she would have been struck from behind. Her evidence is corroborated by her son **Bongani** to a large extent.

[31] **Bongani** takes the narrative further to say he saw the rubber bullet covered in blood next to where his mother stood bleeding. He described it as having been blue in colour. Three independent witnesses who did not know the plaintiff testified about the events of that day. All three confirm that the police wore protective regalia, had rifles and fired at the group of protestors. Those witnesses are **Mr** and **Mrs Matayi**, and **Mr Tose**. **Mr Matayi** did not witness the shooting, but he confirms that the police had rifles before he left the scene which it would appear was before plaintiff got injured.

[32] **Mr Matayi** could not have been referring to a later stage when the defendant suggests firing of rubber bullets took place, because after his wife’s motor vehicle was damaged at around 12h00 they left the scene. Plaintiff cannot be faulted for not having observed the members of the crowd throwing stones at the police. She says she did not observe that not that it did not happen.

[33] All the witnesses who testified on behalf of the plaintiff's case – all five of them told court that there was an armoured vehicle / vehicles at the scene. The police wore protective gear and had rifles in their possession.

[34] For the reasons stated above, including the fact that two of the witnesses were not even aware of plaintiff's alleged shooting. The **Matayis** and **Mr Tose** did not even know the plaintiff and his son, I am satisfied that their evidence can be relied upon. In my view the three witnesses are independent witnesses and unbiased.

[35] What are the probabilities of a contingent of officers that are attached to Public Order Police Unit, a unit that specializes in crowd control, approaching a group of two hundred (200) people who were alleged to be blocking roads, burning tyres and throwing missiles / stones, without protective gear and proper ammunition i.e. rubber bullets. This is also in accordance with police standing orders which were tabled in court. **Felix's** explanation was that they had gone there to assess the situation. What was there to assess – they knew that a group of some two hundred (200) people were blocking roads, burning tyres and throwing missiles. There were only five of them in his team. This is highly improbable in my view. It appears that at more than one spot where rioting was taking place on that day, rubber bullets were used. How is it possible that a unit would be dispatched from its headquarters in Port Elizabeth to go to Uitenhage to quell riots or demonstrations only for them to leave their equipment behind in Port Elizabeth as **Felix** at times would suggest. No direct evidence was presented by or on behalf of the defendant that the plaintiff was struck by a stone as opposed to a rubber bullet. I am in agreement with plaintiff's

submissions that defendant's version is not reliable, is not credible and does not accord with the probabilities.

[36] The defendant has not pleaded any ground of jurisdiction for the shooting of the plaintiff save to deny same. The defendant has in the alternative pleaded contributory negligence on the part of the plaintiff. The defendant bears the *onus* of proving that the negligence of the plaintiff was causally linked to her injury. In my view they did not discharge this *onus*. In his evidence, **Felix** did not even see the plaintiff according to him. So he was not able to say in what way plaintiff was negligent or what was obtaining when she stopped the motor vehicle and alighted there from or what she could have done to avert the mishap that befell her. It is not, according to him as if the plaintiff could see that shots were being fired. In which case she could have foreseen the possibility of being struck by a rubber bullet? On the contrary, according to him, no rubber bullets were fired. In any event, it would have been dangerous for the plaintiff to carry on driving with the onset of an asthma attack eminent or having started.

[37] On the contrary in my view the fact that **Felix** did not even see the plaintiff's motor vehicle or the plaintiff and her son suggests that no measures were taken to ensure that innocent by-passers were not caught in the crossfire. That to me amounts to negligence on the part of defendant's employees.

[38] In the circumstances, I am satisfied that the plaintiff has shown on a balance of probabilities that the defendant is liable for the damages she suffered to her right eye.

[39] *Mr Petersen* who is acting for the defendant argued that in the event that I find in favour of the plaintiff, costs should be awarded on the Magistrates' scale. The basis for this submission is that the parties agreed that the plaintiff suffered damages in the amount of R204 968.56. It must be borne in mind that plaintiff's claim was for R550 400.00, an amount that is excess of the jurisdiction of the Magistrates' courts. In my view, plaintiff was therefore within her rights to institute her claim in the High Court. In fact the High Court was the appropriate forum to adjudicate her claim for R550 400.00.

[40] Accordingly judgment is entered in favour of the plaintiff against the defendant for:

1. Payment of R204 968.56.

2. The defendant shall be liable for interest thereon at the prescribed legal rate with effect from fourteen (14) days after date of the judgment to date of payment.

3. Payment of costs on the High Court scale from fourteen (14) days of *allocator* to date of payment.

4. Costs of an inspection *in loco* at the scene, as well as photographs of the scene.

4.1 Costs of the reports and supplementary reports, if any of:

4.1.1 Dr A Doubell

4.1.2 Dr V Gardiner

4.2 The reasonable qualifying fees and expenses, if any, of:

4.2.1 Dr A Doubell

4.2.2 Dr V Gardiner

5. The costs of the preparation of the argument on behalf of the plaintiff.

**6. The costs of the trial on 21, 25 to 28 May 2015; 15 to 18 February 2016,
as well as 28 January 2019.**

**NG BESHE
JUDGE OF THE HIGH COURT**

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Date/s Heard : 21, 25 to 28 May 2015; 15 to 18 February 2016 and 28
January 2019

Date Reserved : 28 January 2019

Date Delivered : 14 May 2019