

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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| (1) | <u>YES</u> – REPORTABLE |
| (2) | <u>YES</u> – OF INTEREST TO OTHER JUDGES |

CASE NO: 2021-21842

DATE: 11 NOVEMBER 2024

In the matter between:

RICARDO NORMAN EDWARDS

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

**THE PROVINCIAL COMMISSIONER OF POLICE,
GAUTENG PROVINCE**

Second Defendant

THE NATIONAL COMMISSIONER OF POLICE

Third Defendant

Neutral Citation: *Edwards v Minister of Police and Others (21842/2021)* **[2024]**

ZAGPJHC ---- (11 November 2024)

Coram: Adams J

Heard: 21 May, 4 and 12 June 2024.

Delivered: 11 November 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 11 November 2024.

Summary: Delict – liability for – plaintiff physically assaulted by members of the SAPS – hit by rubber bullets fired by SAPS members to quell an unruly crowd – special defence based on private defence and/or necessity – requirements of defence discussed – ‘necessity’ is lawful conduct directed against an innocent person for the purpose of protecting an interest of the actor or a third party against a dangerous situation – whether a situation of necessity existed is a factual question which must be determined objectively – a person may inflict harm in a situation of necessity only if the danger existed, or was imminent, and he or she has no other reasonable means of averting the danger – the means used and measures taken to avert the danger of harm must not have been excessive, having regard to all the circumstances of the case –

Factual disputes – mutually destructive versions – correct approach – to come to a conclusion on the disputed issues a court is required *inter alia* to make a finding on the probability or improbability of each party's version – it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities –

Plaintiff's claim dismissed.

ORDER

The plaintiff's claim is dismissed with costs.

JUDGMENT

Adams J:

[1]. On the morning of Tuesday, 24 November 2020, the plaintiff (Mr Edwards) was hit by rubber bullets fired from a rifle or rifles by a member or members of the Public Order Police ('POP'), a specialised unit of the South African Police Service ('SAPS'). POP is constitutionally mandated to *inter alia* maintain public order, protect and secure the inhabitants of South Africa and their property and to uphold and enforce the law. At the time, Mr Edwards was part of a crowd, who had gathered in front of the *Boxer Store* ('Boxer'), a retail shop in Kliptown. The crowd was demanding that Boxer employs members of the local community in their business, which was opening its doors for the first time on that day. Mr Edwards was in fact one of the leaders of the group of 'demonstrators'.

[2]. According to the police, the crowd, at some stage, became unruly and was threatening violence, and it became necessary for the police to disperse them lest the situation got out of control. Despite a request by the police for the crowd to disperse peacefully, they became more unruly, whereafter a stun grenade was set off and rubber bullets fired into the crowd. This, according to the police, had the desired effect as the crowd dispersed and scattered into all directions. In the process, Mr Edwards was shot and suffered bodily injuries, which required treatment at the local clinic.

[3]. In this action, the plaintiff claims delictual damages from the first defendant (the Minister of Police), the second defendant (the Gauteng Provincial Commissioner of Police) and the third defendant (the National Commissioner of

Police) on the basis that he was unlawfully assaulted by members of the SAPS, who, at the relevant time, were acting in their official capacities as police officers during the course and scope of their employment with the SAPS. The vicarious liability of the defendants – who I shall referred to collectively as the SAPS – is not in dispute.

[4]. It is the plaintiff's case that he was shot unlawfully, wrongfully and intentionally, alternatively, negligently by the police, which caused him personal injuries as a result of which he suffered damages.

[5]. The defendants deny liability for the plaintiff's claim. Their case is that the plaintiff 'was part of a group from the community of Kliptown, who were at the time engaged in violent protest and disturbing other members of the community'. The members of the police attempted, so the defendants allege in their plea, to disperse the violent protesters, amongst whom was the plaintiff, and despite their reasonable request for them to disperse peacefully, the members of the community refused and continued to pose a threat to the lives of the police and members of the public. The police, so their case continues, were compelled to use minimum force to protect themselves and members of the public and to diffuse the threat posed by the protestors, who included the plaintiff.

[6]. The defendants furthermore contend that the plaintiff voluntarily assumed the risk of being assaulted by members of the SAPS when he, as part of the violent protesters, refused to disperse upon being ordered to do so by the police and choosing to pose a threat to the lives of the police and members of the public. In the circumstances, so the pleaded case on behalf of the SAPS is concluded, the assault of the plaintiff was justified in that the members of the SAPS used minimum force to disperse the plaintiff and the other protestors who were at the time acting violently and disturbing public peace.

[7]. In my view, the issue to be considered by me in this action is a factual one relating to whether or not the plaintiff's version of the events on the day in question is to be preferred over the defendants' version. The point is that, if I am to accept

that the incident in question and the events surrounding it happened as described by the witnesses on behalf of the defendants, then, in my view, the assault was justified and therefore not wrongful. If not, then the SAPS is liable for the personal injuries suffered by the plaintiff and his resultant damages.

[8]. I interpose here to mention that, at the commencement of the trial before me on 21 May 2024, it was indicated by Counsel on behalf of both parties that they are in agreement that it would be convenient to separate the issue of the merits / liability from that of the quantum of the plaintiff's claim. I was therefore requested to order a separation of the aforesaid issues. I agreed with these submissions and accordingly made the following order: (a) In terms of Uniform Rule of Court 33(4), the issue of the merits / liability is separated from that of the quantum of the plaintiff's claim; and (b) The quantum of the plaintiff's claim is postponed *sine die*. The trial therefore proceeded before me only on the liability / merits aspect of the matter.

[9]. That then brings me back to the facts in the matter, as elicited from the evidence led during the trial. In that regard, the plaintiff himself gave evidence in support of his case. He also called a witness, one Mr Mfundo Hlengwa (Mr Hlengwa), to corroborate his story. The defendants called two police officers as witnesses. The first witness was a Captain Mzamani Thomas Mathebula (Captain Mathebula), who was the officer in charge of the members of the POP on the morning of 24 November 2020, and the defendants' second witness was Sergeant (F) Nomtombi Nkala (Sergeant Nkala).

[10]. The plaintiff testified that, at the relevant time, he was a member of an informal grouping of concerned Kliptown residents who went by the name and under the style of the 'Kliptown Youth Forum', whose objective commendably was to improve the lives of the youth in Kliptown. They had gotten word that Boxer was opening its store in Kliptown on Tuesday, 24 November 2020, and they resolved that they would attend at the Boxer premises on the said morning to demand that the youth of Kliptown be known in the appointment of employees at the new store. Indeed, members of his organisation, as well other residents from

the area and its surrounds, attended at the Boxer premises on the morning. On his arrival, the plaintiff found that the crowd had already gathered in front of the Boxer shop and that the 'leadership' of the protesters was in a meeting with the Boxer management inside the shop. He, himself being a leader, joined the meeting upon his arrival. At the meeting there was a discussion with the Boxer management regarding the employment of the youth of Kliptown.

[11]. The plaintiff's evidence was furthermore that, after they had made representations to the Boxer management, an undertaking was given by management that the matter would be escalated to 'Senior Management' of Boxer. The community leaders were excused and asked to leave the store to give the Boxer management a chance to caucus and to speak, there and then, to their 'Senior Management'. The community leaders, of which Mr Edwards was one, was told that management would report back to them in about one hour. Mr Edwards and his co-leaders, so his evidence continued, obliged and went out to address the crowd and to report to their members on what had transpired during the meeting. Whilst he was busy addressing the crowd – not even fifteen minutes after they had left the meeting – the police told them that they needed to move away from in front of the store. The plaintiff's evidence was that they were instructed to move 200 meters away from the front of the store. He was in the process of complying with this instruction, so Mr Edwards testified, by marshalling the crowd away from the store, when out of the blue the police set off what he described as a 'smoke bomb', probably referring to a stun grenade. And immediately thereafter, the police started shooting into the crowd, which caused chaos, with people running and scattering in all directions, including the plaintiff.

[12]. The plaintiff continued testifying that he ran about 200 meters away from the scene for about forty seconds, when he realised that he had been shot. He lost consciousness and was thereafter assisted by a friend and taken to a nearby informal settlement where he waited for an ambulance to be transported to hospital. He was later transported to the Chiawelo Clinic, where he received treatment and was discharged at about 15:00. He then went home. He confirmed

that the injuries he suffered were on his back and caused him a lot of pain and discomfort.

[13]. Under cross-examination, Mr Edwards confirmed that members of the SAPS were also present at the meeting with the Boxer management. It was put to him that, during the meeting, it was explained to them, as the community leaders, that there were no more vacancies at the store, as Boxer had simply taken over the Pick 'n Pay staff. They were therefore told to go and report this fact to their members. Mr Edwards denied this and insisted that there was an undertaking that Boxer management would revert to them within an hour, after having consulted with Senior Management. It was furthermore suggested to Mr Edwards that, when he reported to the crowd that there were no positions available, as he was advised during the meeting, the crowd became excited and rowdy and they were clearly upset with what they heard. In order to quell the unruly crowd, so it was put to Mr Edwards, the police set off the stun grenade and shot rubber bullets. Mr Edwards denied all of this.

[14]. The plaintiff's next witness, Mr Hlengwa, confirmed in the main the version of the plaintiff. He was also present in the early morning meeting, which he confirms was attended by Boxer management, members of the SAPS and the Kliptown community leaders. Importantly, he confirmed that Boxer management told them that there were no vacancies at the store, but he testified that they (the Boxer store management) nevertheless said that they'll speak to Senior Management and revert in an hour. He also confirmed that, whilst the plaintiff was busy addressing the crowd, the stun grenade was set off by the police, who immediately thereafter started shooting rubber bullets into the crowd. Under cross-examination, Mr Hlengwa rejected the suggestion that it was made quite clear to them at the meeting that there were no positions available at Boxer and that they were required to convey that message to their members. He remained adamant that they were told that management would revert in about an hour with a response from Senior Management in regard to their proposal that Boxer employs at least two youths from Kliptown.

[15]. For the defendants, Captain Mathebula gave evidence that they, being the POP, were called to the Boxer store because there was reportedly a rowdy and an unruly crowd blocking the entrance into the store. On their arrival at the shop, he indeed found a crowd of about twenty people blocking the entrance to Boxer. He gathered the leaders from the crowd, after enquiring about their reason for being there, and went into the shop with them with a view to seeing if a settlement could be negotiated. Inside the shop, so the captain's evidence went, the leaders discussed their demand for employment of the community members with the Boxer management, who advised the leaders that they took over the Pick 'n Pay business as a going concern, with its staff. This meant, so it was explained to the leaders, that there are no new positions or vacancies in the new shop. Captain Mathebula testified that this was clearly not acceptable to the leaders of the protest, who insisted that their demands be met. The leaders indicated that they would not be leaving unless and until people from the community were offered employment at the newly opened shop. It became clear to him, so the evidence of the captain continued, that the parties were not going to there and then solve anything. And so he asked the leaders to leave the store with him, which they were reluctant to do. After a short while, they all left the store.

[16]. Captain Mathebula denied that the management of Boxer undertook to immediately escalate to Senior Management the demands of the protestors and to revert to the crowd and their leaders within an hour's time. He also denied that Boxer agreed to at least consider offering employment to two of the members of the youth from Kliptown. He further testified that he then left the store with the leaders, who reported to the crowd on what had transpired at the meeting. The leaders reported to the community members that Boxer had indicated that they would not, at that point, be able to offer employment to anyone, as there were no vacancies. This, according to the captain, clearly angered the crowd, who became rowdy and wanted to force their way into the store. He thereupon sounded a warning and instructed the crowd to disperse. The crowd became more unruly and started to move forward, intending to breach the line that had been formed by police officers to prevent entry into the store. The crowd broke

down the gate. Captain Mathebula gave the crowd thirty minutes to disperse, but they refused to do that. Instead, they became more agitated and started hurling stones and objects at the police.

[17]. The captain, who was at that stage concerned that the situation was spiralling out of control, set off a stun grenade, which caused some, but not all, of the crowd to start running away. There were however others who remained defiant and was insisting on entering the Boxer premises, whereupon he ordered, so the captain testified, his officers to fire rubber bullets to quell the unruliness. A few from the crowd fell down and others ran away. They arrested those who had fallen down.

[18]. Captain Mathebula denied that the crowd was peaceful and that they were not, in any way, a threat to the police. His response was to the effect that police can't just set off a hand grenade and shoot rubber bullets at residents for no reason at all. If the crowd was peaceful, why then, the captain asked rhetorically during his evidence, would the police set off a stun grenade. He was quite adamant in his vigorous denial that the crowd was definitely not peaceful.

[19]. Under cross-examination, it was suggested to Captain Mathebula that his version is improbable in that it is unlikely that twenty people (who were blocking the entrance to the shop) would be so brave and hurl stones and other objects at the twenty police officers. His response to that suggestion was simply that people from the 'location' are not afraid to throw stones at the police. It was also put to the captain that he was not prepared to engage with the community members. He had no intention to engage with the community members, but was ever ready and very quick to resort to violence. He responded to this proposition by pointing out that he was the one who took the leaders to the local management of Boxer with a view to finding a solution to the problem. The community members, so the captain retorted during cross-examination, were the ones who were not prepared to listen to reason. They wanted to fight with the police.

[19] The second witness on behalf of the SAPS, Sergeant Nkala, testified that she was, at the relevant time, a member of the POP and was part of the contingent which attended at the Boxer store on 24 November 2020. Her commander, she confirmed, was Captain Mathebula. She testified that, on their arrival at the store, which she says was previously a Pick 'n Pay shop, she found about five hundred people at the gate. Their captain was busy speaking to them and after a few minutes he went into the store with some of the leaders of the crowd, apparently to go and speak to management. At that time, they remained outside to keep an eye on the situation. After a while, so Sergeant Nkala's evidence continued, the captain came out with the leaders, who then reported to the members of the community on what had transpired inside the store during the meeting. The community members were clearly not happy with what was reported to them, and started to push the gate. The captain tried to calm the situation, but the crowd remained visibly agitated. He thereupon told them to disperse, but the crowd insisted on entering the Boxer store.

[20] After the captain gave the crowd a final warning, they started hurling stones at the police and security officers and the people were insistent on getting into the shop. The captain then set off the stun grenade, which caused some of the protesters to flee. However, there were others who defiantly remained behind, and the captain ordered them (the other members of the POP) to fire rubber bullets, and the crowd dispersed. Sergeant Nkala denied that there was no need for the police to resort to setting off the stun grenade or to fire rubber bullets. The crowd, according to her, was violent and they continued throwing stones at the police, which necessitated the use of force to quell the situation.

[21] Under cross-examination, Sergeant Nkala was confronted with the apparent contradiction between her evidence and that of Captain Mathebula in relation to the number of community members found in front of the store when they arrived there. She had said five hundred people, whereas the captain said about twenty. She also confirmed that the captain requested the crowd to disperse on more than one occasion, but his instructions were flatly ignored. She

described Captain Mathebula as a patient man. She also remained adamant that the crowd was far from peaceful.

[22] As I have already indicated, the dispute between the plaintiff and the defendants is a factual one. I have before me two mutually destructive versions relating to the events on Tuesday, 24 November 2020.

[23] The plaintiff states that on the day in question they (he and other members of the community) were peacefully waiting on the feedback from the Boxer management in regard to their demand for employment of the youth from Kliptown. Suddenly and for no apparent reason the police set off a stun grenade and started shooting rubber bullets into the crowd, a couple of which hit the plaintiff and caused him personal injury.

[24] On the other hand, it is the version of the SAPS that the crowd was unhappy with what was reported to them on the outcome of the meeting with Boxer management and they became increasingly agitated and unruly and was threatening violence. The community members then started hurling stones and other objects at the police and was forcing their way onto the Boxer premises. All of this, so the version of the police goes, necessitated the use of some force to quell the unruly crowd. They accordingly set off a stun grenade and shot rubber bullets, which brought the situation back under control.

[25] As already indicated, if I accept the version of the police, the plaintiff's claim must fail. I revert to the reasons for such conclusion later on in the judgment.

[26] The question to be considered by the court is therefore whether, having regard to all of the evidence before me, the version of the defendants is more probable than that of the plaintiff. In that regard, I am of the view that the defendants, who raise a 'special defence' of justification bears the onus to proof absence of wrongfulness. If the probabilities are equally balanced, then the plaintiff gets the benefit of the doubt. The point being that an assault on the person of another is *prima facie* wrongful and any defendant who claims that an

assault was not wrongful bears the onus to prove absence of wrongfulness. *In casu*, the assault is common cause.

[27] In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others*¹, the Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain, as far as possible, where the truth lies between conflicting factual assertions. The SCA held 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 probability or improbability of each party's version on each of the disputed issues.

In light of the 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 a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors equipoised, probabilities prevail'. (Emphasis added)

[28] Also in *National Employers' General Insurance Co Ltd v Jagers*² the court remarked as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the

¹ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others* 2003 (1) SA 11 (SCA) at para 5.

² *National Employers' General Insurance Co Ltd v Jager* 1984 (4) SA 437 (ECD) at 440D-441A.

court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* (supra) and *African Eagle Assurance Co Ltd v Cainer* (supra). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a court first to consider the question of credibility of the witnesses as the trial judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities. (Emphasis added)

[29] Lastly, in *Govan v Skidmore*³, the following principle was enunciated:

'In finding facts or making inferences in a civil case, it seems to me that one may, as *Wigmore* conveys in his work on evidence ... by balancing probabilities select a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one.'

[30] I need to apply these authorities to the matter before because I am faced with two mutually destructive versions on the incident in question. The version of the plaintiff is irreconcilable with that of the defendants. Accepting the one means of necessity a rejection of the other.

[31] The starting point of the discussion and the analysis is the probabilities. As was held in *Stellenbosch Farmers' Winery* (supra), I am required to assess the probability or improbability of each party's version on each of the disputed issues. In that regard, I am of the view that the version of the plaintiff is an inherently improbable one. One needs only to relate the story to conclude that it is improbable. The important part of the version is that all was well in the land – the crowd was peaceful and well behaved and they were waiting for feedback from Boxer management, which they had been promised would be forthcoming

³ *Govan v Skidmore* 1952 (1) SA 732 (N).

in about one hour. Then – all of a sudden and for no apparent reason – the police unleashed a violent attack on the crowd, who, it must reiterated, was the personification of peaceful. This narration, in my view, especially the fact that there was no reason for the police to act in the manner they did, is the very definition of improbability. We know from our everyday experience that things happen for a reason.

[32] Moreover, on the version of the plaintiff, Captain Mathebula, who at the beginning of the saga was the voice of reason and the one who allowed the parties to engage with each other with a view to finding a solution to the impasse, then turned into this wholly unreasonable public official, who was only interested in unleashing violence on a peaceful crowd. Again, the Inherent improbable is self-evident. To this must be added the uncontested evidence by Sergeant Nkala that the captain is a very patient man, which is the exact same impression created by him when he gave his evidence in court. He has had considerable experience in crowd control and he struck me as an officer who understands his responsibilities and the rights of South African citizens.

[33] I am furthermore of the view that, on the probabilities, the crowd was unhappy with the fact that their demands were not being met and they resolved to give expression to the discontent by resorting to violence. It is highly unlikely that the police would have opted for violence when faced with a docile crowd. The version of the SAPS has a ring of truth to it.

[34] In my view and having regard to the above considerations and the probabilities in their totality, the version of the defendants is more probable than that of the plaintiff. Therefore, as per the dicta in the *National Employers' General Insurance Co Ltd* (supra), I am satisfied that the defendant's evidence is true and that the plaintiff's version is false.

[35] Mr Matera, Counsel for the plaintiff, urged me to reject the defendants' version on the basis that there were contradictions between the evidence given by Captain Mathebula and Sergeant Nkala's evidence. Much was made of the

fact that the captain testified that, on his arrival at the shop, there were about twenty people blocking the entrance, whereas Sergeant Nkala's evidence was to the effect that, when they arrived on the scene, the crowd totalled about five hundred people. Furthermore, Captain Mathebula testified that ten of the protesters were arrested, whilst Sergeant Nkala said that nobody was arrested.

[36] The difficulty with this contention is that the evidence on behalf of the plaintiff was equally contradictory. In that regard, the plaintiff testified that he in fact arrived late for the meeting, whilst his witness said that the plaintiff was at the meeting right from the start. The witness also gave testimony to the effect that at some point during the meeting, it was suggested to Boxer management that they should at least, at that stage, consider employing two members from the Kliptown youth and it was this proposal that was going to be taken to Senior Management of the company. The plaintiff, during his evidence, made no mention of such a proposal. The point is simply that the criticism levelled against the evidence on behalf of the defendants is equally applicable to the plaintiff's evidence.

[37] Moreover, the contradictions are, in my view, not of a material nature and are not of the kind that it can be said that they show that the defendants' witnesses were dishonest. As was held by the Appellate Division in *S v Mkhle*⁴, citing with approval the dicta in *S v Oosthuizen* 1982 (3) SA 571 (T)⁵, 'contradictions *per se* do not lead to the rejection of a witness' evidence; they may simply be indicative of an error. Not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence'.

[38] In any event, the contradictions alluded to by Mr Matera are relied upon by him presumably to impugn the credibility of the defendants' witnesses.

⁴ *S v Mkhle* 1990 (1) SACR 95 (A).

⁵ *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C and 576G-H.

However, in view of my above findings relating to the probabilities in the matter, a finding relating to credibility is unnecessary. As was held in *Jagers* (supra), it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities. I have already found that the probabilities undoubtedly favour the defendants.

[39] The only question remaining is whether these facts, as found by me based on the evidence of the defendants' witnesses, ground a conclusion that the assault on the plaintiff's person was justified and therefore not wrongful. The applicable legal principle relates to self-defence, also referred to as private defence, and/or necessity.

[40] In *Petersen v The Minister of Safety & Security*⁶, it was held at para 11 as follows: -

'[11] Can it be said that in these circumstances the police action which caused Justin's injuries does not attract liability because it was justified in circumstances of necessity? Unlike self-defence – also referred to as private defence – the defence of necessity does not require that the defendant's action must be directed at a wrongful attacker. There was therefore no need for the respondent to establish that Justin was himself part of the attacking crowd. What the respondent had to prove in order to establish the justification defence of necessity, appears, for example, in broad outline, from the following statements in *'Delict' 8(1) Lawsa (2ed)* by J R Midgley and J C van der Walt, para 87:

'An act of necessity can be described as lawful conduct directed against an innocent person for the purpose of protecting an interest of the actor or a third party ... against a dangerous situation ...

Whether a situation of necessity existed is a factual question which must be determined objectively ...

A person may inflict harm in a situation of necessity only if the danger existed, or was imminent, and he or she has no other reasonable means of averting the danger ...

The means used and measures taken to avert the danger of harm must not have been excessive, having regard to all the circumstances of the case ...

⁶ *Petersen v The Minister of Safety & Security* 2009 JDR 0826 (SCA).

(See also eg: *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 (2) SA 118 (SCA) paras 13 and 14; D Visser 'Delict' in F de Bois (ed); Wille's Principles of South African Law 9ed (2007) 1146; Neethling, Potgieter & Visser Law of Delict 5ed (2006) Chap 3 para 6.3.)

[41] On the basis of the facts in this matter, it cannot be disputed that the police were protecting legal interests not just of Boxer, but also of the general public, against a dangerous situation, that being the unruly crowd of protesters who were threatening to and insisting on forcing their way into Boxer's premises. There is also, in my estimation, little or no doubt that factually and objectively a situation of private defence or necessity existed in that the crowd was not just threatening violence but they were also being violent. They were not prepared to heed any order from the police that they disperse immediately. The SAPS was clearly entitled to inflict harm in the situation of necessity, because a danger was not just imminent but also in fact existed. Importantly, the SAPS had no other reasonable means of averting the danger – attempts were made to persuade the protesters to disperse and to vacate the area, but their pleas fell on deaf ears. What else were the police expected or required to do, I ask rhetorically.

[42] Moreover, it cannot be said with any conviction that the police, in order to avert the danger of harm, used means and took measures, which were excessive, having regard to all the circumstances of the case. Captain Mathebula first attempted to talk to the protesters with a view to persuading them to stand down. Only when his pleas fell on deaf ears did the captain activate the stun grenade, which had limited impact in that some, but not all of the protesters reacted to the stun grenade and ran away. There were still a number of defiant protestors remaining, which left the captain and the members of the SAPS with no alternative but to fire rubber bullets into the crowd. They ceased fire as soon as the unruliness had been quelled and the crowd dispersed. So, I reiterate that, having regard to all of the circumstances in the matter, the means used and the measures taken by the police to avert the danger of harm were by no means excessive.

[43] I therefore conclude that the requirements for the defence based on private defence or necessity have been met by the defendants.

[44] Mr Matera submitted that the defendants cannot rely on the defence based on private defence or necessity not just because they did not prove the elements of the defence but also because the defence had not been pleaded by them. I disagree. The defendants pleaded that the assault of the plaintiff 'was justified in that the members of the defendants used minimum force to disperse the plaintiff and the other protestors who were at the time acting violently and disturbing public peace'. I am of the view that this formulation of the defence can and should be interpreted as a private defence and necessity defence. The intention to plead the aforementioned special defence can also safely be inferred from the following paragraphs in the defendants' plea: -

- '5.3. The members of the police attempted to disperse the violent protesters, amongst who was the plaintiff, and despite the reasonable request to have them disperse peacefully, the members of the community refused to disperse and continued to pose a threat to the lives of the police and members of the public.
- 5.4. The members of the police had to use minimum force to protect themselves and members of the public and to diffuse the threat that had been posed by the protestors including the plaintiff.'

[45] For all of these reasons, the plaintiff's claim falls to be dismissed.

Costs

[46] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. In that regard, I do not accept the submission by Mr Matera that the *Biowatch* principle finds application. There are no constitutional issues implicated in plaintiff's action.

[47] The plaintiff should therefore be ordered to pay the defendants' costs of the action.

Order

[48] Accordingly, I make the following order: -

The plaintiff's claim is dismissed with costs.



L R ADAMS

*Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

HEARD ON:	21 May, 4 and 12 June 2024
JUDGMENT DATE:	11 November 2024 – judgment handed down electronically
FOR THE PLAINTIFF:	M Matera
INSTRUCTED BY:	P Sekgoape Attorneys Incorporated, Pretoria
FOR THE FIRST, SECOND AND THIRD DEFENDANTS:	D D Mosoma
INSTRUCTED BY:	The State Attorney, Johannesburg