IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable
Case no: A101/2024

In the matter between

KEITUMETSE JOYCE MOLOI **APPELLANT**

and

MINISTER OF POLICE **RESPONDENT**

Neutral citation: *Moloi v Minister of Police* (A101/2024) [2025] ZAFSHC 275 (29 August 2025)

Coram: MUSI JP and DAFFUE J and BOONZAAIER AJ

Heard: 07 MAY 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 16h00 on 29 AUGUST 2025.

Summary: Personal Injury – shooting - dismissal of claim - violent nature of protest and threat posed by community members in large numbers – did not apply excessive force - to proof is the nexus between the injuries sustained and the shooting - appellant placed herself in a dangerous situation – appellant failed to prove that she was injured as a result of a shooting incident.

ORDER

The appeal is dismissed with costs, inclusive of the costs of two counsel, to wit senior counsel on scale C and junior counsel on scale A in accordance with Rule 67A of the Uniform Rules of Court.

JUDGMENT

Boonzaaier AJ (Musi JP and Daffue J concurring)

Introduction

[1] This is an appeal against a judgment of a single judge of this Division, (the *court a quo*). The judgment concerned the appellant's claim for damages arising from injuries sustained. The trial proceeded on the merits only, with the determination of the quantum of damages postponed for later adjudication. This appeal is brought with the leave of the Supreme Court of Appeal.

Factual background

[2] The appellant, instituted action against the respondent founded on her alleged right to be paid damages by the respondent as a consequence of injuries she sustained on 20 January 2020. The appellant`s claim is premised on the ground that the cause of her injuries was as a result of being shot with a rubber bullet by a member or members of the South African Police Services (SAPS), there and then acting within the course and scope of their employment with the respondent. The respondent carrying vicarious liability for the actions of the unknown policeman.

[3] As a result of the alleged shooting, she sustained an abrasion on her forehead and a fractured right ankle for which she received medical treatment at the Manapo Hospital in Phuthaditjhaba. She consequently holds the respondent liable for damages in the sum of R850 000, representing future medical expenses and general damages.

[4] From the particulars of claim it is evident that the cause of action against the respondent is premised on the allegation that when the member of the SAPS aimed and fired the shot at the appellant, he did so unlawfully and deliberately with the intention to injure and hurt the appellant; in the alternative the appellant relies on negligence of the said police officer when he fired the said bullet.

[5] It is common cause that on 20 January 2020, when the appellant was injured, a protest took place in Phuthaditjhaba against poor service delivery and the scarcity of water, which escalated into violence. The primary location of the rioting was Mampoi Road, the main thoroughfare. The plaintiff resided on Rakitla Street, which runs diagonally to Mampoi Road.

[6] The appellant contends that she was shot and injured while on Rakitla Street in Phuthaditjhaba. She maintains that she was an innocent bystander with no involvement in any protest activity - a claim corroborated by her witness, Mr Matabula.

[7] The particulars of claim make it clear that the appellant's case is based on the assertion that an unidentified member of the SAPS fired a rubber bullet at the appellant without any lawful justification or cause, resulting in the incident in question. In substantiating her assertion that she was negligently shot by an employee of the respondent, the appellant states, in essence, that the said unidentified member of the SAPS failed to exercise the reasonable care that was expected of him when handling his firearm and failed to take reasonable steps expected in the circumstances in order to prevent her shooting.

[8] The SAPS member also had a legal duty to the public to refrain from acting unlawfully and negligently in any manner. However, this member of the SAPS unlawfully and negligently discharged a firearm under the circumstances described above.

The appellant's version

[9] The appellant denied that she, in any way, voluntarily assumed the risk of being shot or that she was in any way negligent as the respondent alleged. She testified that after leaving her home in the morning, she witnessed a vehicle having been set alight

earlier on Mampoi Road. Under cross-examination she confirmed that she left home knowing very well that there was a complete shut-down in the area resulting from the violent protest and that the police would be involved to control the unruly crowd. When asked by the respondent's counsel whether she was afraid of the violence that had erupted, she replied that she wanted to see what was happening with her own eyes. Seeking safety, she took refuge at the home of a certain Mr. Twala, located on Rakitla Street, three houses down from the intersection with Mampoi Road. Approximately 30 minutes after her arrival, the police arrived at the house, apprehended the appellant along with others present and took them to the two Nyala vehicles parked in Mampoi Road. However, she was subsequently released from one of the vehicles and began walking down Rakitla Street, at which point she was shot.

[10] Additional details about the incident reveal that the appellant sustained her injury some distance into Rakitla Street, facing away from Mampoi Road where the unrest had occurred. There was no evidence of any stone-throwing on Rakitla Street; any such activity appeared to be confined to Mampoi Road and was behind her at the time. It was submitted that it was, therefore, unlikely that she was struck by a stone on her forehead. The appellant further testified that she saw a policeman approaching from the opposite direction, firing shots at people who were running in the vicinity of her home. She immediately felt a blow to her forehead and collapsed. After she regained her consciousness, her face was full of blood. She tried to stand up but could not. When she looked down at her legs, she realized that her right ankle was broken; she does not know what caused her injury. People came to assist her and took her to Mr Twala`s house from where she was transported to hospital, where she was treated for her injuries.

[11] It was argued that given the undisputed evidence that at least 1 760 rubber bullets were fired by the police during the course of the day, the probabilities overwhelmingly support the appellant's version that she was struck on the forehead by a rubber bullet. She could, however, not identify the policeman who allegedly shot her.

[12] It was further argued that the appellant was removed from the sanctity of Mr Twala's house and taken to the Nyala vehicles. After being released, she was walking down Rakitla Street when she was shot. The crucial point is that the appellant was present at the location on Rakitla Street, at the specific time and place of the shooting, not of her

own volition, but because the police had placed her there. It was therefore incorrect to conclude that the appellant had full knowledge of the risk in question, fully appreciated it, and voluntarily assumed it.

[13] The appellant conceded that it was necessary for the SAPS to take action against the violent crowd on that specific day. The intensity of the violence and how rapidly it escalated has also not been disputed.

Respondent`s version

[14] In resisting the appellant's claim, the respondent on the other hand, maintains that no protest action took place in Rakitla Street. Rather, the protest occurred on Mampoi Road.

[15] The respondent submitted that members of the SAPS had been alerted to a planned unlawful gathering in Phuthaditjhaba and the intervention of the SAPS was solicited. At approximately 06:00 on the specified date, a group of individuals began assembling illegally along Mampoi Street, a main thoroughfare in the area.

[16] Over the course of the day, the crowd grew significantly, reaching an estimated size of between 400 and 500 people. Many participants were armed with stones and sticks, and the surrounding streets were barricaded with rocks and burning tyres, effectively halting all traffic in and out of the vicinity. The gathering became increasingly volatile, and SAPS members' attempts to restore order and disperse the crowd were met with aggression, including the throwing of stones at police officers. Given the escalating threat to public safety and the safety of SAPS personnel, the use of rubber bullets - fired into the ground - was deemed the only reasonable and proportionate method to disperse the crowd and avert further danger.

[17] The respondent firmly maintains that members of the SAPS did fire rubber bullets to disperse a rioting crowd, but this occurred only at Bluegum Bush and in Mampoi Road. Furthermore, the respondent provided evidence that their members were deployed on Mampoi Road and specifically asserted that they were never present at Rakitla Street. Given the circumstances, the actions of the SAPS members at Bluegum Bush and in Mampoi Road were executed out of necessity and were legally justified under the

prevailing legislation and their overarching duty to protect the public.

[18] One Zwane, a videographer who was documenting the protest, testified that the police were confronted with violent scenes, including barricaded streets with stones, billowing smoke, widespread vandalism and looting of shops; a large crowd of protestors was milling around the area. Captain Molema, the platoon commander, also testified and corroborated Colonel Motaung's statement, asserting that the rubber bullets used that day lose their impact within a 100-meter radius and therefore could not have caused a bleeding injury, let alone the injuries allegedly sustained by the appellant.

[19] Captain Moleme further emphasized that the SAPS focused their attention on Mampoi Street, where the protest occurred, and he did not observe any police presence either on foot or in Nyalas on Rakitla Street. He added that a Nyala vehicle would not be able to access such a street.

[20] In the final alternative, the respondent argued that if it is proven that there was protest action on Rakitla Street and that the appellant was shot by a rubber bullet fired by a member of the SAPS, the appellant having been aware of the protest action, voluntarily assumed the risk of harm by placing herself in the vicinity of the protesting and violent group who attacked the SAPS with rocks and risked injury under those circumstances. The respondent submitted the following in paragraph 14 of the heads of argument:

'The respondent denies that the appellant was shot by its member/s let alone by a rubber bullet, alternatively pleads that if indeed the appellant was injured by a rubber bullet, that the appellant was not shot at Rakitla Street but at Mampoi road where she was part of the rioting group which the police sought to disperse by firing rubber bullets to restore public order, which shooting was justified. In the further alternative, liability is disputed on the grounds that the plaintiff contributed to her own injuries by standing within the crowd of protestors thereby placing herself in danger of being shot.'

The main issues

[21] The primary issue on appeal is whether the court *a quo* was correct in finding that the appellant failed to prove that the injuries she sustained were attributable to the conduct of the SAPS, and consequently, that no liability attaches to the respondent. The appellant contends that the court a quo erred in this regard and that the respondent should be held 100% liable for the appellant's proven or agreed damages, together with

costs.

[22] Counsel for respondent argued that the onus of proof was on the appellant to prove that: (i) on 20 January 2020; (ii) at Rakitla Street; (iii) an incident took place when the appellant was shot and struck with a rubber bullet in the centre of her forehead; (iv) the rubber bullet was fired by an unknown member of the SAPS; (v) the unknown member of the SAPS was part of a unit who was busy controlling a protest action; (vi) when the alleged shot was fired the unknown member was acting within the course and scope of his employment with the respondent; (vii) the appellant was not part of the protest; (viii) the appellant was an innocent bystander; (ix) the unknown member fired the rubber bullet at the appellant; (x) the unknown member had no legal cause or reason to fire the bullet at the appellant; and (xi) the unknown member fired the rubber bullet at the appellant unlawfully, deliberately and with the intention to injure and hurt the appellant.

[23] In the alternative the appellant had to prove that the unknown member was negligent when he fired the rubber bullet at the appellant in that he fired the shot:
(i) without due and proper care; (ii) without aiming properly; (iii) when it was objectively not necessary to do so; (iv) when it was objectively not necessary to disperse any crowds; (v) when he was legally not allowed to do so; (vi) from such close proximity that it was reasonably foreseeable that he would seriously injure the appellant contrary to the provisions of the Standard Operating Procedures of the SAPS and Act 68 of 1995; and (vii) in breach of a legal duty.

[24] The respondent's counsel also submitted that the appellant had to prove that the impact of the rubber bullet to her forehead rendered her unconscious and as a result of being struck, she fell to the ground, during which she sustained a compound fracture to her right ankle and an abrasion to her forehead. The appellant needed to prove further that she sustained severe physical and psychological injuries in accordance with a medico-legal report of Dr Andre Vlok, an orthopedic surgeon and the hospital records.

The issues for determination

[25] Essentially, this Court is called upon to determine whether the trial court's findings of fact ought to be disturbed, in particular, whether it was incorrect in finding that the appellant failed to prove that the injuries she sustained were attributable to the conduct of the SAPS, and consequently, that no liability attaches to the respondent.

[26] The court is also called upon to consider whether the appellant's shooting was justified and, thus, whether the appellant as plaintiff in the court *a quo* proved her claim on a balance of probabilities. In so far as the alternative defences raised by the respondent are concerned, this Court must also determine whether, on a balance of probabilities, it has been established that the appellant consented to her injury by placing herself in harm's way; as well whether, by her own negligence in the form contended for by the respondent, she contributed to the injury that she suffered.

The trial and incidence of onus:

[27] Although the burden rested on the respondent to justify the shooting if it could be proven, the appellant was still required to prove that she was shot by an unidentified police officer and that the firing of the rubber bullet caused her injury.

[28] The appellant was a single witness to the shooting incident. Mr Matabula who testified on behalf of the appellant, confirmed that he did not witness the shooting incident, nor did he witness any policeman firing a rubber bullet at that stage. The appellant, in essence, challenges the trial court's findings of fact and its evaluation of evidence, as well as its alleged displacement of the *onus* by requiring the appellant to make out a *prima facie* case.

Main grounds of appeal

[29] The appellant asserted that:

i) The court a *quo* failed to give sufficient weight to the uncontested evidence presented by the appellant, who testified that she was injured some distance into Rakitla Street, facing away from Mampoi Road. Additionally, the appellant's testimony that no stones were thrown in Rakitla Street and that the unidentified policeman who approached her shot her with a rubber bullet was disregarded.

ii) The court a *quo* relied on hospital records which were never admitted into evidence as part of the trial bundle. Consequently, there was no proper basis for the court to conclude that 'the allegation that she was injured by a rubber bullet is not supported by the hospital admission records,' which state under clinical information that the plaintiff 'fell on her right ankle and hit [illegible] her forehead on the ground.'

iii) The court a *quo* sustained an objection to the admissibility of evidence concerning

the 'reduced rubber' bullet on the grounds of non-compliance with rule 36(9)*(a)* and *(b)* of the Uniform Rules. However, in its judgment, the court relied on this very inadmissible evidence as corroboration in concluding that the appellant could not have been shot on the forehead by a rubber bullet.

iv) The appellant was taken from Mr. Twala's house without her consent, and the injury occurred under circumstances beyond her control. Therefore, she cannot be attributed with full knowledge or appreciation of the risk involved and cannot be deemed to have voluntarily assumed that risk.

The applicable legal framework:

[30] Concerning the incidence of the *onus*, the distinction between the onus of proof and the evidentiary burden of proof must be kept in mind. As held in *Pillay v Krishna and Another*[1] the word '*onus'* means 'the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be . . .'[2]

[31] The appellant was indeed a single witness whose evidence could found judgment in her favour only if the court *a quo* was satisfied that she had proven her case on a balance of probabilities.

[32] It is trite that in appeals, the appeal lies against the order and not the reasons therefor. A court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court and will only interfere where the trial court materially misdirected itself insofar as its factual and credibility findings are concerned. This is trite law[3] as held in *S v Francis*:[4]

'The powers of a court to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only

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[1] *Pillay v Krishna and Another* 1946 AD 946.
[2] *Ibid* 952-953.
[3] *R v Dhlumayo and Another* 1948 (2) SA 677 (A).
[4] *S v Francis* 1991 (1) SACR 198 (A) at 198j-199a.

in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony.'

[33] *In casu* the court was confronted with mutually destructive versions. The court must be mindful of the approach to be followed in resolving mutually destructive versions from opposing parties. In *National Employers General Insurance Co Ltd v Jagers*,[5] this approach was articulated as follows:

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

[34] A litigant who fails to adduce evidence about a fact in issue, whether by not giving evidence or by failing to call witnesses, runs the risk of the opponent's version being believed.[6] However, the fact that the one party fails to adduce evidence to contradict the other party's version does not necessarily mean that that version should be accepted. It will always depend on the probative strength of such version, *ie* whether it was strong enough to cast an evidential burden on the party failing to present evidence.

[35] Against this background, this Court must weigh the probabilities as they arise from the conspectus of all the evidence and the circumstances of the case. As held in *Maitland and Kensington Bus Co (Pty) Ltd v Jennings*,[7] for judgment to be given for the appellant,

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[5] *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (ECD) at 440D-G; see also *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at 14I-15D.

[6] *Brand v Minister of Justice* 1959 (4) SA 712 (AD) at 715D-716H and the authorities referred to by Schmidt and Rademeyer, *The Law of Evidence* para 3.2.4.1 issue 23.

[7] *Maitland and Kensington Bus Co (Pty) Ltd v Jennings* 1940 CPD 489 at 492.

the Court must be satisfied that sufficient reliance can be placed on her story for there to exist a strong probability that her version is the true one. And, in *Ocean Accident and Guarantee Corporation Ltd J v Koch*,[8] it was held that the evidence presented by the burdened party must be such that the court can say that it is more probable than not for the burden to be discharged. However, if the probabilities are evenly balanced, then the burden has not been discharged by the party on whom it rests. It is accepted that insofar as the dispute, *ie* whether the appellant was hit by a rubber bullet fired from a firearm operated by an unknown policeman, might have been adjudicated based on circumstantial evidence, the appellant had to show that the inference to be drawn from the proven facts is the more plausible inference from several conceivable ones, even though that inference was not the only reasonable one to be drawn from the facts.[9]

Application of the law

[36] Counsel for the respondent pointed out that there is no evidence that the alleged unknown member of the respondent ever aimed at the appellant when the alleged shot was fired. There is also no evidence that a shot was fired at the appellant. The respondent's version is that there was no unrest in Rakitla Street and no shooting was required in that area. It was argued that the appellant knew from the outset that she must prove that she was shot by a rubber bullet and she simply did not overcome that hurdle. She never saw a rubber bullet which allegedly injured her. The distance between the appellant and the unknown member when the shot was fired is unknown. She does not even know what caused her alleged injuries because she testified that she was hit by something.

[37] On the appellant's version, she was walking away from Mampoi Road and was thus facing a totally different direction. It is highly improbable that a policeman approaching her from the front and moving in the direction of Mampoi Road would find it necessary to fire a shot in her direction, she being an innocent person that caused no threat at all. This must also be considered in light of the particulars of claim where she pleaded that the unknown policeman aimed at her and then fired a shot, alternatively that he acted negligently on the basis as pleaded. The appellant testified that she was walking

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[8] *Ocean Accident and Guarantee Corporation Ltd J v Koch* 1963 (4) SA 147 (A) at 157D.
[9] *Ibid* at 159C-D; see also *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (AD) at 614H-615B.

on the pavement in Rakitla Street. On a question by her counsel whether there were any other people in her immediate vicinity at the time that she was injured, she stated 'there were no people nearby me'. The appellant's version that members of SAPS drove three times past them in Mampoi Road and shooting in their direction where they were standing at the bus stop, looking at the vehicle that was burning – they being innocent bystanders – is false, or at best for her, highly improbable.

[38] Her only witness could not solve her problem regarding the rubber bullet nor the shooting by an unknown policeman. As mentioned in the previous paragraph, the unrest and shooting did not happen in the vicinity where she was shot, but in Mampoi Road. The appellant's version on numerous occasions that 'nothing' happened in Mampoi Road in her presence, is false. She did not see stones (rocks) in the road and did not hear chanting by the protestors, notwithstanding the video evidence which was showed to her whilst in the witness stand. Her version that she was unaware of protest action in Mampoi Road is contradicted by her witness, Mr Matabula and the respondent's witnesses.

[39] The parties agreed during the pre-trial conference which allegations were to be adjudicated by the court *a quo*. This was recorded by the appellant's counsel whereupon a separation of issues was ordered. The allegations in paragraph 5 of the particulars of claim needed to be proven by the appellant. In this paragraph she pleaded that 'as a direct result of the incident when [she] was struck by the bullet on the forehead, [she] was knocked unconscious by the force of the bullet which caused her to fall to the ground, during which process she sustained a compound fracture to her right ankle and an abrasion to the forehead.' She relied on a medico-legal report of Dr André Vlok, an orthopaedic surgeon.

[40] In view of the foregoing, it is my view that on a balance of probabilities, the most plausible inference to drawn, in the absence of any acceptable direct evidence, is that the appellant was not struck by a bullet fired by an unidentified policeman and that the injury may have been caused by something else. In particular, no direct, expert evidence was tendered to prove that the injury to her forehead was caused by a rubber bullet. It is not necessary to speculate what caused her to fall and fracture her ankle. Suffice to mention that she could have fallen off the steps pointed out in evidence, or when stepping onto or off the pavement, or during a stampede by protestors.

[41] The court a *quo* was not satisfied that a causal nexus exists between the shooting and the injury sustained by the appellant.

Conclusion

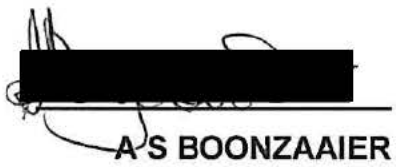
[42] For these reasons, there is no basis for criticizing the trial court's finding that the appellant did not prove her case. I come to the conclusion that the court a *quo* correctly dismissed the claim. The appeal ought to be dismissed.

[43] When the court considers costs, it has a discretion which must be exercised judicially. There is no reason to deviate from the general rule that costs follow the event. The appellant employed senior counsel during the hearing and on appeal. The respondent instructed a senior and junior counsel to argue the appeal. There is no reason why the respondent should not be entitled to the fees of its counsel, senior counsel on scale C and junior counsel on scale A.

Order

[44] The following order is made:

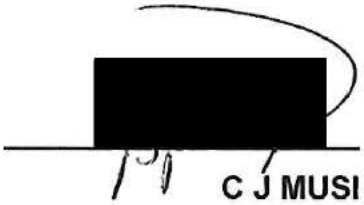
The appeal is dismissed with costs, inclusive of the costs of two counsel, to wit senior counsel on scale C and junior counsel on scale A in accordance with Rule 67A of the Uniform Rules of Court.



A S BOONZAAIER

ACTING JUDGE OF THE HIGH COURT

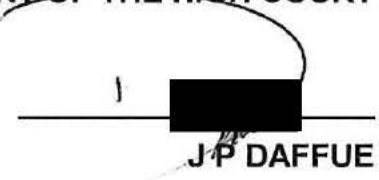
I concur.



C J MUSI

JUDGE PRESIDENT OF THE HIGH COURT

I concur.



J P DAFFUE

JUDGE OF THE HIGH COURT

Appearances

For the Appellant:	L Le R Pohl SC
Instructed by:	Honey Attorneys, Bloemfontein.
For the Respondent:	H J Cilliers SC and T Ntoane
Instructed by:	State Attorney, Bloemfontein.