



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D4462/2021B

In the matter between:

SINDISIWE NOVUKA

PLAINTIFF

and

ETHEKWINI MUNICIPALITY

DEFENDANT

ORDER

The following order shall issue:

1. The defendant is ordered and directed to pay the plaintiff 100% of her proven damages arising from the injuries she sustained in an incident which occurred on 18 February 2020.
2. The defendant is ordered and directed to pay the plaintiff's taxed or agreed party and party costs of the action on scale C, such cost to include the costs of Senior Counsel, including Counsel's preparation for trial, consultations with witnesses and heads of argument.

3. The defendant is ordered and directed to pay the interpreter's fees for 1 and 2 September 2025.

JUDGMENT

RAMDHANI AJ

Introduction:

[1] The plaintiff's action against the defendant is for patrimonial damages arising from the injuries she sustained on her right eye, consequent upon being struck by a paintball projectile which was discharged from a paintball rifle, which she alleges was discharged by the defendant's security guards.

[2] The defendant admitted the shooting incident, however denied liability to the plaintiff's claim and pleaded, inter alia, that the paintball projectile was discharged and shot by the defendant's security guards, when they were confronted '*by a crowd of violent people who attacked the said security guards*'. The defendant further pleaded that the defendant's security guards discharged the paintball projectiles to disperse the aforesaid group of individuals, who were allegedly robbing members of the public.

[3] At the commencement of the trial, and by agreement between the parties, the plaintiff's Counsel sought an order for the separation of issues in terms of the provisions of rule 33(4) of the Uniform Rules of Court, which order the Court granted. The trial thus proceeded solely on the determination of liability and merits.

The common cause facts:

[4] At the commencement of the trial, the parties provided the Court with a list of the common cause facts.

[5] By agreement, the parties admitted the following:

- (a) An incident took place on 18 February 2020, on the pavement in the immediate vicinity of the Super Bets shop on Anton Lembede Street, Durban, not far from its intersection with Russell Street;
- (b) The incident involved the shooting of paintball projectiles at people, from a paintball rifle depicted in exhibit 'B' at page ten;
- (c) The shooting was at the instance of two security guards employed by the defendant, acting in the course and scope of their employment with the defendant;
- (d) The defendant and/or its agents, and/or its employees, owed members of the public and the plaintiff, in particular, a legal duty to take precautions when utilising their paintball rifles when discharging their duties and responsibilities and to ensure the safety of members of the public at all material times;
- (e) On 18 February 2020:
 - (i) The plaintiff suffered an injury to her right eye;
 - (ii) The defendant's security guards shortly after the incident were made aware that she had suffered such an injury and observed her injury; and
 - (iii) The plaintiff was taken by the security guards to Addington Hospital where she was treated.

The Pleadings:

[6] By way of the plaintiff's particulars of claim dated 30 May 2021, the plaintiff pleaded inter alia as follows:

- (a) At all material times the defendant employed a number of security guards under its security and risk management division, whose sole mandate is to provide security and intelligence services to the defendant and to the residents of the Municipality;
- (b) The defendant and/or its agents and/or employees owed members of the public and the plaintiff in particular a legal duty to take precautions when utilising their firearms when discharging their duties and responsibilities and to ensure the safety of members of the public at all material times;
- (c) On or about 18 February 2020 at approximately 19h15 at Anton Lembede Street on the pavement in the vicinity of Spar and the Super Bets Store, Durban,

KwaZulu-Natal, the plaintiff was shot and injured by a security guard then and there being employed by the defendant and acting within the course and scope of his employment with the defendant alternatively furthering the interest of the defendant, further alternatively acting as an agent of the defendant;

- (d) The incident occurred as a result of the negligence on the part of the employee/agent of the defendant who was negligent in one or more of the following respects:
- (i) He discharged his firearm in a densely populated area;
 - (ii) He discharged his firearm without having regard to the safety of innocent passer-by's;
 - (iii) He discharged his firearm in such a fashion that it constituted a danger to members of the public and more particularly to the plaintiff;
 - (iv) He discharged his firearm without ensuring that the projectile fired by that firearm would not cause injury to innocent pedestrians; and
 - (v) As a result of the injuries, the plaintiff required medical and related treatment which treatment included hospitalisation at Addington Hospital and was thereafter transferred to McCords Hospital for further emergency treatment and surgery.

[7] By way of the defendant's amended plea dated 5 May 2025, the defendant stated inter alia as follows:

- (a) On 18 February 2020 two of its security guards responded to a complaint by a member of the public who reported that a group of individuals known as the Tanzanians were robbing members of the public at Anton Lembede Street in the vicinity of Spar and Super Bets Store;
- (b) The security guards attended to the complaint and were confronted by a crowd of violent people who attacked the said security guards;
- (c) The security guards dispersed the crowd using paintball markers which is an instrument used as a minimum force tool for dispersing of crowds;

- (d) The plaintiff emerged shortly thereafter 'the situation had been cleared and told the security guards that she had been injured as an innocent bystander during the confrontation';
- (e) The 'instruments' used by its security guards were paintball markers which were generally used by the defendant's security guards to disperse crowds;
- (f) It was necessary for the security guards to use the said paintball markers in the circumstances that presented on the date and time of the subject incident;
- (g) The defendant could not admit or deny that the plaintiff was shot by the security guards on duty using paintball markers;
- (h) The defendant denies that its security guards acted negligently;
- (i) The security guards acted in a manner justifiable under the law taking into account the circumstances that presented before them on the date and time of the subject incident;
- (j) The situation necessitated a minimum amount of force and the amount of force used was proportioned to the degree of the threat posed by the violent group;
- (k) In the alternative the defendant pleaded that the plaintiff's negligence on the date and time of the incident contributed to the harm and damages she suffered in that a reasonable person present at the time, date and location of the incident would have steered clear of the area and thus avoid any stray paintball markers; and
- (l) In the further alternative should the Court find the defendant's agents were negligent in discharging the paintball markers in the circumstances surrounding the incident, such negligence be apportioned in terms of s 1 of the Apportionment of Damages Act 34 of 1956.

The Plaintiff's evidence: Sindisiwe Novuka:

[8] The plaintiff testified as follows.

[9] The plaintiff tendered into evidence exhibits 'A' and 'B'. Exhibit 'A' comprised of inter alia the case docket under Durban Central case number 490.03/2020, various statements and hospital records. Exhibit 'B' comprised of a photograph album, which photographs the plaintiff captured and was thereafter provided to the plaintiff's attorney.

[10] She instituted summons against the defendant in regard to the aforesaid incident which took place on 18 February 2020. At the time of the incident, she was employed by Boxer Superstores as an administrative manager and she was living in the CBD, at the Bishopsgate block of apartments situated on Russell Street.

[11] On 18 February 2020, she finished work at around 7pm and on the way to her residence she walked from the Boxer Superstore to the St Georges arcade laundromat, to fetch her laundry.

[12] She made reference to exhibit 'A9' which is an aerial photograph of the CBD more particularly a depiction of various streets namely Anton Lembede Street, Russell Street and DR Yusuf Dadoo Street.

[13] With reference to the photograph exhibit 'A9', she marked as Point 1 the Boxer Store at which she worked at and marked and identified as Point 2 the Spar store situated in the St Georges arcade.

[14] She made reference to a demarcated black line with arrows indicating the direction in which she walked from the Boxer Superstores to the St Georges arcade laundromat, situated on Anton Lembede Street, formerly known as Smith Street.

[15] She left the Boxer Store from the rear door, walked down Covenant Lane and then turned right into Yusuf Dadoo Street formerly known as Broad Street. She then turned right onto Anton Lembede Street and walked towards the St Georges Spar Store, located in the St. Georges arcade.

[16] She proceeded to the laundromat and collected her laundry. She then walked out of the arcade, turned left into Anton Lembede Street and walked on the pavement with the intention of proceeding in a westerly direction to her apartment situated on Russell Street.

[17] Whilst she was walking in a westerly direction on Anton Lembede Street she observed that there were other pedestrians who were also walking on the pavement, in different directions. As it was a rainy day, she also observed that there were people standing on the pavement beneath certain sheltered sections, alongside the stores situated on Anton Lembede Street, she observed that certain of these stores were open for trade and that there were also street vendors trading.

[18] During the course of her evidence and with the reference to her walking from the St Georges Spar to her residence, she made reference to the photograph album namely exhibits 'B1' to 'B9'.

[19] With reference to exhibit 'B1', the said photograph depicted the Spar Store and St Georges arcade, where the laundromat was located. She stated that when she turned left at the exit of the passage, she walked past the Nibbles Store, depicted in exhibit 'B1'. She identified exhibits 'B2', 'B3', 'B4' and 'B5' as being the photographs which depicted the pavement on which she was walking in an easterly direction towards Russell Street.

[20] As she was walking on Anton Lembede Street in the vicinity of the Super Bets Store which was depicted in exhibits 'B6' and 'B7', she then observed that there were people running towards her, in consequence whereof she immediately decided to turn and also run. Exhibits 'B6' and 'B7' reflect a store identified as 'BETFRED', which at the time of the incident formerly traded under the name of Super Bets Store.

[21] As she turned to run in the opposite easterly direction namely towards the St Georges arcade and was about to start running, she heard a sound and at the same time felt something hit her on her right eye. Immediately thereupon she fell down onto the ground with her bag, which contained her laundry. She then got up and continued running in an easterly (opposite) direction towards the St. George's arcade and she then stopped in the vicinity of the entrance to the St. George's arcade.

[22] When questioned as to what she felt in her right eye, she said that she had felt something hitting her painfully in her right eye. During the course of her testimony, and with reference to her injury, she pointed towards her right eye and the inner part adjoining her nose. She stated that there was a cut on her right eye.

[23] She was visibly crying and requested for help, whereafter she approached two adult males who were dressed in security uniforms and another adult male Steven Masikhane also known as. One of the security guards enquired from her what had happened. She stated something had hit her right eye, which was cut. One of the adult males who later identified himself as Senzo requested her to remove her hand from the right eye which she was covering with her right hand. Senzo then asked her to remain with the security guards who were standing with him.

[24] Senzo informed her that he was going to the people who did this to her as he knew them. He further informed her that she was shot by a rubber bullet. She stood by the security guards and observed Senzo walking in a westerly direction towards the Russell Street. She thereafter went to the area where Senzo was speaking to the defendant's security guards.

[25] There were three security guards in the presence of Senzo. They were dressed in blue uniforms. She stated that they apologised to her for the injury that she sustained. She was informed that the defendant's security guards received a complaint from a street vendor that a gang of individuals known as the Tanzanians were robbing members of the public.

[26] The defendant's security guards offered to take her to the hospital. They thereupon took her to the Addington Hospital in a white van which had four doors. When she got to the Addington Hospital, Dr Gama attended to her. She made reference to exhibit 'A12' which comprised of the hospital records from Addington Hospital. She went through the said document which identified her name as being the patient. The hospital personnel

cleaned the cut on her right eye, placed a patch on her eye and dispensed to her pain tablets.

[27] She was also provided a referral letter and, in this regard, made reference to exhibit 'A14' which provided that she proceed to the McCords Hospital. Exhibit 'A19' was a referral note from the Addington Hospital, signed by Dr Gama. After she was treated at the Addington Hospital, the defendants security guards then took her back to her residence. On the way back to her residence, the defendants security guards bought her a Nandos meal and she was given R130.00 which they said would assist her to go to the McCords Hospital. She stated that the security guard that gave her the money identified himself as Khanyile.

[28] Subsequently and on 19 February 2020, she proceeded to the McCords Hospital. She made reference to exhibit 'A20' which is the McCords Hospital records which evidenced inter alia that she was hospitalised from 19 to 26 February 2020. She was discharged on 26 February 2020. She stated that her right eye was bleeding and that she was treated for the injury that she sustained to the right eye.

[29] She stated that on 3 March 2020 she went back to the McCords Hospital. She made reference to exhibit 'A21' which comprised of the hospital records evidencing that she was hospitalised from 3 to 12 March 2020. She stated that the reason why she went back to hospital was that whilst she was at work using her computer, her right eye became extremely painful.

[30] She made reference to exhibit 'A17' which evidenced that she was admitted to the McCords Hospital on 29 April 2020 and discharged on 11 May 2020. The said documents evidenced inter alia that there was blunt trauma to her right eye. On 29 April 2020 she underwent surgery and was then in hospital from 29 April 2020 to 11 May 2020.

[31] She then was asked whether she had any communications with Khanyile after the incident and stated that because they had exchanged cellphone numbers on the day of

the incident, they communicated with each other via WhatsApp and he apologised to the plaintiff.

[32] She stated that during the WhatsApp communications, Khanyile had repeatedly apologised to her for being shot her in her eye. She did not have the WhatsApp communication because she had a new phone.

[33] After the incident, she stated that she also communicated with Senzo who enquired how she was feeling. Senzo had also taken her cell number on the day of the incident. She further stated that before the incident, she did not know Senzo. She only got to know Senzo on the day of the incident.

[34] During the course of her cross-examination, the defendant's Counsel put to her the defendant's version which was as follows.

- (a) On 18 February 2020 two of its security guards responded to a complaint by a member of the public who reported that a group of individuals known as the Tanzanians were robbing members of the public at Anton Lembede Street in the vicinity of Spar and Super Bets Store;
- (b) The security guards attended to the complaint and were confronted by a crowd of violent people who attacked the said security guards;
- (c) The security guards dispersed the crowd using paintball markers which is an instrument used as a minimum force tool for dispersing of crowds;
- (d) The plaintiff emerged shortly after 'the situation had been cleared and told the security guards that she had been injured as an innocent bystander during the confrontation.';
- (e) On the date and time of the incident the defendant's security guards were approached by other private security guards who worked in the area, who informed the defendant's security guards that the plaintiff had been injured;
- (f) That it was the defendant's case that they did attend to her injury;
- (g) That they did take her to hospital;
- (h) That they did take her home after having taken her to Addington Hospital;

- (i) That the defendant's security guards had acted in the manner that they did namely that they discharged paint balls from paintball guns in response to 'an act of violence' and the defendants deny that the security guards acted negligently. When being confronted with this version, the plaintiff stated that she did not see any violence in front of her;
- (j) In the event that the Court finds that the plaintiff was shot by security guards, the defendant will argue that there was no negligence on the part of the security guards; and
- (k) It was further put to the plaintiff that there was no proof that the plaintiff was shot from a projectile which was discharged from the paintball guns from which the defendants security guards shot 'the Tanzanians'. In response to this version, the plaintiff stated that the defendants security guards apologised to her after the incident and admitted that they were responsible for her being shot in the eye and took her to the hospital to treat the injury that she sustained. It was further stated by the defendant's Counsel that in the event that the Court finds that the plaintiff was indeed shot by the defendant's security guards then and in that event it will be argued that there was no negligence on the part of the defendant's security guards.

[35] It is significant to note that the defendant did not challenge the plaintiff's version in regard to the repeated apologies that were made to the plaintiff by the defendants security guards. The plaintiff argued that the apologies and the remorse for the injury caused to the plaintiff was evident by the defendants security guards taking the plaintiff to Addington Hospital in the vehicle, returning the plaintiff to her apartment, buying her food from Nando's and giving her money for her to attend McCords Hospital.

[36] During the course of cross-examination and with reference to exhibits 'B6' and 'B7', the plaintiff stated that she observed people running towards her in the vicinity of the Super Bets Store. She was questioned as to whether she heard any 'instrument' being discharged prior to her feeling something hitting her eye and she said she did not hear

any sound. She stated that she did not hear any noise because of the people that were screaming and running towards her.

[37] In *HAL obo MML v MEC for Health, Free State* the court said the following:¹

'...Credibility has to do with a witness's veracity. Reliability, on the other hand, concerns the accuracy of the witness's testimony. Accuracy relates to the witness's ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence.' (Footnote omitted.)

[38] The cross-examination did not elicit any contradictions in the plaintiff's version. She was a credible witness, who was candid. She presented her testimony in a concise manner, entirely based on her own recollections. Under cross-examination she steadfastly maintained her version. She also made concessions where required. All in all, she was a reliable and honest witness.

Steven Masikhane:

[39] The plaintiff further called Steven Masikhane also known as Senzo, as a witness.

[40] Senzo stated that on 18 February 2020 he was in close proximity to the St Georges arcade and that he resided at a block of apartments in close proximity to the arcade. He was standing approximately 4 to 5 metres away from the Nibbles Store depicted in exhibit 'B1'. He resided at a block of apartments in close proximity to the Spar, namely City Life Smith Towers.

[41] He was standing outside on the pavement talking to a friend. He then heard a sound and then observed people running towards him in the direction of the St Georges Spar arcade. He described the sound as something ending with a thud. He stated that he recognised the sound as being that of a rubber bullet sound as he had during the

¹ *HAL obo MML v MEC for Health, Free State* [2021] ZASCA 149; 2022 (3) SA 571 (SCA) para 66.

course of his employment as a guard at strikes that were held at the Mthatha and Walter Sisulu College. He further stated that he was trained to use a weapon which discharged rubber bullets. He was performing bodyguarding services at the Mthatha College.

[42] He saw people running on the pavement from a westerly direction towards him. As people were running in his direction, he observed a female who was crying and had her hand on her eye. He requested that she move her hand whereupon he then saw a mark on her eye and further observed that she had tears in her eye which had blood. He further stated that he had observed that the plaintiff had a cut on the outside of her eye. He stated that he had met with the plaintiff about one to two minutes after he had heard the sound of what thought was rubber bullets being fired.

[43] He requested the plaintiff to remain where they were and then immediately approached the defendant's security guards who were wearing eThekweni Municipality uniforms. He asked them why they had shot at the plaintiff and why they had shot the rubber bullets. One of the defendant's security guards apologised and said it was his colleague who had shot the paintball projectiles.

[44] The defendant's security guard informed Senzo that they would take the plaintiff to hospital. Before they could take the plaintiff to the hospital, he took down the plaintiff's cell phone number. He further stated that he did not know the plaintiff before the incident.

[45] Masikhane was cross-examined by the defendant's Counsel and during the course of cross-examination he confirmed inter alia the following:

- (a) At the time of the incident, he stood in close proximity to the Nibbles Store;
- (b) He had seen the plaintiff approximately one to two minutes after he had heard the discharge of what he thought was a rubber bullet;
- (c) When he confronted the defendant's security guards and stated the plaintiff had been injured in her right eye, the defendant's security guards had apologised for the plaintiff having been shot; and

- (d) That the defendant's security guards transported the plaintiff with the defendant's motor vehicle to the Addington Hospital.

[46] The cross-examination of Masikhane did not elicit any contradictions in Senzos version. He was a credible witness and presented his testimony in a concise manner and under cross-examination he steadfastly maintained his version.

The Defendant's witness:

[47] The defendant adduced the viva voce testimony of Mr Ayanda Nzama ('Nzama')

[48] Nzama stated inter alia that he was employed by the defendant for the past eight years in the defendant's security management unit and that he held the position of a 'protector'.

[49] His day-to-day duties entail the receipt of complaints from members of the public and in this regard his responsibilities as a protector was to protect the community. Prior to his employment with the defendant, he underwent security guard training and obtained the qualification as a grade A security guard. He is also trained to utilise firearms and portable handheld two-way radio receivers' and he was also educated about the Municipality Local Bylaws.

[50] Whilst in the employ of the defendant he also received training from the Metro Police situated at the Metro Police College in Pinetown. He received training in the use of a pistol, rifle and shotgun. With reference to the incident which occurred on 18 February 2020, he started work at approximately 7am. From approximately 7am to approximately 4pm, he was undertaking duties in regard to land invasion namely fighting against land invasion and thereafter from approximately 4pm until 10pm, he was carrying out duties of crime prevention in the CBD. His crime prevention duties entailed stopping and preventing crime in the CBD and in this regard protecting the community in hotspot areas.

[52] On 18 February 2020 he commenced his crime prevention duties at approximately 4pm and he was posted together with other security guards Bonginkosi Khanyile ('Khanyile') and Mr Khanyase. ('Khanyase'), at the corner of Russell Street and Anton Lembede Street. He made reference to exhibit 'A9' which depicted the intersection of Anton Lembede and Russell Streets.

[53] With reference to the incident which took place at approximately 7pm he stated that whilst he was with the other two security guards, he received a complaint that was made by a street vendor who was trading in front of the Super Bets Store, which street vendor stated that a group of individuals identified as the Tanzanians were robbing members of the public. Upon receipt of the complaint, he together with the other two security guards employed by the defendant made their way to the area in the vicinity of the Super Bets Store, the purpose whereof was to disperse and remove them from the area.

[54] When they arrived near the Super Bets Store, they came upon 'the Tanzanians', who were gathered alongside a vendor stand. He stated that the group of Tanzanians comprised of approximately 15 people. He identified the group of individuals as being Tanzanians by the way that they dressed namely that they wore blue overalls/jackets'. He stated that the Tanzanians were a group of people who were troublesome in that particular hotspot area.

[55] Upon coming into close proximity to the Tanzanians and when they were approximately five metres away from them, the Tanzanians were requested to disperse and move out of the area, however, immediately upon the request being made for them to disperse and move out of the area, one of the persons in the group threw a bottle of Savanna at them. In response to one of the Tanzanians throwing a bottle of Savanna at them, he stated that 'we shot them with a paintball with an aim of removing them'. He described the paintball as being the equivalent to a 'pellet gun'. He stated that the defendant's security guard use it as minimum force and that he was trained to use a paintball gun.

[56] He stated that in consequence of him being trained to use a firearm, you do not need training for a paintball gun. He made reference to exhibit 'A10', which was a photograph depicting a similar type of paintball gun that he used on the day in question. He described the manner in which the paintball gun is used namely that at the top, one loads paintballs into the hopper (see exhibit 'A10.1') and at the bottom there is a gas cylinder (exhibit 'A10.2').

[57] He further stated that his duties entailed discharging paintballs in public areas and that the security guards employed by the defendant were allowed to use paintball guns to move/disperse groupings of people if they believed that they were 'under attack'. He stated that when the paintball gun was discharged, they were in front of the Super Bets Store and that the Tanzanians were standing alongside the table at which vendors traded from. He referred to exhibits/photos 'B7' and 'B8'. He stated that he and his colleagues were standing on the pavement facing the easterly direction on Anton Lembede Street in the direction of the St Georges Street arcade and the Tanzanians were facing them in the opposite westerly direction.

[60] He stated that when the paintball guns were discharged, the Tanzanians were approximately five metres away from them and that he and his colleague namely Khanyile discharged their paintball rifles and shot at the Tanzanians. They discharged about six or seven paintballs and that upon doing so, the Tanzanians then immediately dispersed and then ran away. After they had successfully dispersed the Tanzanians he and his one colleague namely Mr Khanyile then returned to their post where they were originally situated namely at the corner of Anton Lembede Street and Russell Street.

[61] Approximately six minutes later, they then went back to look for Khanyase. They then found Khanyase who was in the presence of another private security guard who worked on Anton Lembede Street. This security guard informed them that a lady was injured. He and his two colleagues then rushed to where the plaintiff was situated and found the plaintiff who was crying.

[62] He stated that '*looking at the situation we agreed to take her to the hospital*'. They then took her to the Addington Hospital in the defendant's vehicle. At the Addington Hospital, the plaintiff was treated and was referred to a specialist as she had an injury to her right eye.

[63] After the plaintiff was treated at Addington Hospital, they then drove with her back to her residence. He remembered that the plaintiff was wearing a Boxer Store uniform and remembered her as being light in complexion.

[64] He stated that before they took her to the Addington Hospital, he did observe that her eye was red and further that 'the way she was crying it was a sign that she got hit on her eye'. He stated that at the time that they had seen the plaintiff, her eye was not bleeding. In regard to the Boxer uniform, he stated that it was a shirt which had bold stripes on it.

[65] He further stated that when him and his colleagues instructed the Tanzanians to disperse, he did not observe the plaintiff. He stated he and his two colleagues namely Khanyile and Khanyase took the plaintiff to the Addington Hospital. He stated that both him and his colleagues were present when the plaintiff was being admitted however not present when she was being treated. He said that they were at the Addington Hospital for approximately 30 to 45 minutes.

[66] After she was treated, they took her back to her apartment however on the way, he stated that whilst they transported her to Addington Hospital and to her apartment, he does not recall whether they spoke. After the incident, he stated that he did communicate with the plaintiff on WhatsApp and checked if she was recovering. After they had left the plaintiff at her residence, they completed their duties at approximately 10pm.

[67] With reference to there being any protocols in place in dealing with incidents similar to that which took place on 18 February 2020, more particularly when a member of the

public was injured when they dispersed a crowd, he stated that usually he worked in the land invasion unit and in the informal settlements. He further stated he never had an incident where anyone was injured however in the present situation when the plaintiff was injured, him and his colleagues saw it fit to take her to the hospital.

[68] Nzama was cross-examined by the plaintiff's Counsel, which cross-examination elicited the following evidence:

- (a) That he and his colleagues received a complaint from a vendor who was passing the area where they were stationed and that she was coming from the area of the Super Bets Store where a certain group of Tanzanians were robbing people in that vicinity;
- (b) That when they had approached the Tanzanians, the Tanzanians were speaking amongst themselves;
- (c) That him and Khanyile had paintball guns in their possession;
- (d) That when they were five metres away, he instructed the Tanzanians to disperse and leave that area;
- (e) He stated that when he had instructed them to do so, one of the persons in the group threw a Savanna bottle at them;
- (f) He stated that the bottle did not hit either him or his two colleagues and that the bottle landed in front of them on the ground;
- (g) That is when he and Khanyile then fired six or seven paintballs at the Tanzanians;
- (h) In response to a question as to why did they shoot paintballs at the Tanzanians, he stated that *'because they started throwing, it shows that they were fighting'*; and
- (i) He was questioned as to why he did not warn them that if they did not move away, they would fire paintballs at them. He responded by stating that *'they knew that they were not supposed to be there because we usually remove them'*.

[69] He was also questioned as to why did they not warn them that if they did not disperse and move away from that area, they would shoot at them and he responded by stating that *'I saw it better'* and that he stated that him and Khanyile had shot at them after they had thrown the bottle. He further stated that there was no warning that they would be

shot, they just shot at them after the bottle was thrown and according to his training, a warning shot was previously required however a warning shot was not required during the present training that they underwent. He stated that since they were wearing security guard uniforms, the Tanzanians ought to have been aware that if the security guards approached them, they could remove them and that he and his colleague used 'minimum force'.

[72] In response as to why they did not warn them, he stated that 'according to my knowledge I don't know of such a requirement of a warning'. He was further asked why they did not shoot a paintball warning shot into the air. He once again responded that 'according to my knowledge warning shots was used previously. He further repeated that according to the most recent training that they had received they were not trained to shoot warning shots and that warning shots were no longer used. It was further put to him that if he had shot a warning shot that the Tanzanians would have moved away, he denied this and said not according to his training.

[74] He stated further that their intention was to chase the Tanzanians away and that they return to where they normally were situated namely under the bridge. He was asked as to why the Tanzanians informed them why they did not want to move away and stated that they did not say anything to them but instead threw a bottle of Savanna in response.

[75] He was further asked to whether it was more appropriate to communicate with them and stated that according to his training, he was not trained to communicate with them and that them having thrown a bottle 'was a sign that they were declaring a war'.

[76] When questioned about whether the Tanzanians were in possession of any weapons, he stated that he did not see any weapons namely a knife or anything of the sort, however they usually use knives but he could not be sure whether they were in possession of weapons on the day in question. He stated that if he had in fact seen that they were in possession of any dangerous weapons, he would have used his firearm instead of the paintball gun.

[77] He stated that when the incident happened, it was raining and that there were not many people on the pavement. He confirmed at the time of the incident, the Spar Store was opened for business. He stated that at the time of the incident, he did not observe any other street vendors trading. He confirmed that the paintball is fairly powerful and when shot by a paintball gun, it could be painful and that if a person's eye was shot, it could cause serious damage. He disputed that the plaintiff was shot in the eye from the paintballs that were discharged by him and Khanyile and stated that based on the space and distance between him and the Tanzanians, it did not make sense.

[80] He stated that after the incident, he and his colleagues had seen the plaintiff whose eye was red and who was crying and that a security guard pointed them in the direction of where the plaintiff was situated, and that the security guard further showed them that the lady was struck in the eye. When questioned as to what would have struck her eye, he said he did not know.

[81] When questioned as to why he and his colleagues took the plaintiff to Addington Hospital, he stated that it was because of the injury to her eye and that they did so because this was not usual that they would do so and that they were being supportive to the plaintiff. He further stated that they did not challenge the security guard who had stated that they had shot the plaintiff and stated that they had no reason to challenge a security guard.

[82] He confirmed that both him and Khanyile shot at the Tanzanians and stated that in regard to Khanyile, he did not believe that Khanyile was coming to Court to adduce evidence. He stated that Khanyase had passed away. Notwithstanding that the defendants attorney had communicated in writing to the plaintiff's attorney that the defendant would be calling Khanyile as a witness, without more and without any explanation whatsoever, Khanyile was not called as a witness. The plaintiff argued that the court should draw an adverse inference for the failure by the defendant to call Khanyile

as a witness as the evidence led by the plaintiff was that Khanyile apologised to the plaintiff for having shot the plaintiff with a paintball projectile.

[84] In my view the failure to call Khanyile as a witness to testify about the incident and the plaintiff's version namely that Khanyile had apologised to the plaintiff for having shot her is material, and of cardinal importance to the defendant's defence. No explanation was furnished by the defendant for this failure, nor did the defendant proffer any explanation as to why Khanyile was not available to testify. Accordingly, in view of the importance and, or, clarity that Khanyile might have provided to the court, I must as a matter of course draw an adverse inference from the failure to call Khanyile.

[85] Adverting to the testimony of Nzama, notwithstanding his best endeavours, his evidence did not support and substantiate the defendant's version that both him and Khanyile shot paintball projectiles at the Tanzanian's out of necessity and justification. Neither did his evidence establish that the defendant's security guards were under attack by *'a crowd of violent people who attacked the said security guards'*.

[86] Nzama's evidence did not inspire confidence in the defendant's defence and version and did not establish that the conduct of discharging and firing paintball projectiles in response to one of the Tanzanians throwing a bottle of Savanna at the defendant's security guards was a reasonable response, more so a response to a 'dangerous situation' and their apprehension and belief in acting as they did is sufficient.

[87] Nzamas evidence that *'we shot them with a paintball with an aim of removing them'* and that them having thrown a bottle *'was a sign that they were declaring a war'* further fortifies the court's finding that the firing of the paintball projectiles was unjustified and not necessary: and further that the defendant's security guards were not faced with a 'dangerous situation' and were not justified in discharging the paintball projectiles.

Assessment and Analysis:

[88] By way of the defendant's heads of argument, the defendant admitted that:

- (a) On 18 February 2020 at the intersection of Russell Street and Anton Lembede Street, in close proximity to the Super Bets store and at around 19h30 the defendant's security guards discharged paintball projectiles towards a crowd of people;
- (b) The plaintiff was injured in the location of her eye 'at around the same time'; and
- (c) After the injury was reported to the defendant's security guards, the defendant's security guards transported the plaintiff to Addington Hospital, waited while she was treated and thereafter transported her to her home.

[89] The defendant disputed that the plaintiff was shot by the defendant's security guards and denied that the defendant's security guards acted negligently in discharging the paintball projectiles. The defence was one of justification and necessity and that the defendant's security guards were justified in discharging and firing the paintball projectiles in that they '*were confronted by a crowd of violent people who attacked the said security guards*'.

[91] It is trite that, every infringement of bodily integrity is prima facie unlawful and once the infringement is proved, the onus rests on the wrongdoer (the defendant) to prove a ground of justification.

[92] *Mabaso v Felix*² stated that:

In actions for damages for delicts affecting the plaintiff's personality and bodily integrity, such as assault, it is fair and accords with experience and common sense that the defendant should ordinarily bear the onus of proving the excuse or justification, such as self-defence. That approach is ordinarily correct and should be followed in such cases, unless the form of the pleadings in any particular case places the onus on the plaintiff to negative the excuse or justification. If the excuse or justification pleaded is self-defence, the onus is generally on the defendant to plead and prove that the force used by him in defending himself was in the circumstances reasonable and commensurate with the plaintiff's alleged aggression, again unless the pleadings place the onus on the plaintiff.

² *Mabaso v Felix* 1981 (3) SA 865 (A) at 865D-E

[93] The plaintiff *in casu*, bore the onus of proof that, the defendant's security guards who discharged and fired the paintball projectile were negligent and acted wrongfully.

[94] In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*³ the Supreme Court of Appeal ('SCA') held:

'But our law also recognises that there are circumstances in which even positive conduct that causes bodily harm will not attract liability. That is so where the harm is caused in circumstances of necessity, which have been described as occurring when the conduct is "directed against an innocent person for the purpose of protecting an interest of the actor or a third party (including the innocent person) against a dangerous situation". It is well established that whether particular conduct falls within that category is to be determined objectively. That the actor believed that he was justified in acting as he did is not sufficient. The question in each case is whether the conduct that caused the harm was a reasonable response to the situation that presented itself.' (Footnotes omitted.)

[95] In *Petersen v The Minister of Safety & Security*, the SCA said as follows:⁴

'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 JR 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 . . .

³ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* [2006] ZASCA 168; 2007 (2) SA 118 (SCA) (*Crown Chickens*) para 10.

⁴ *Petersen v The Minister of Safety & Security* [2009] ZASCA 88 (*Peterson*) para 11; See also *Crown Chickens* paras 13-14; F du Bois et al *Wille's Principles of South African Law* 9 ed (2007) at 1146.; Neethling et al *Law of Delict* 5 ed (2006) at 80.

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 . . .”

[96] As per the SCA judgment of *Crown Chickens* the question in each case is whether the conduct that caused the harm was a reasonable response to the situation that presented itself.

[97] The evidence by the defendants sole witness namely Nzama was that upon an instruction being conveyed to the Tanzanians to disperse and move out of the area, one of the persons in the group threw a bottle of Savanna at them and in response he stated that ‘we shot them with a paintball with an aim of removing them’ and that them having thrown a bottle ‘was a sign that they were declaring a war’.

[98] When questioned about whether the Tanzanians were in possession of any weapons, Nzama stated that he did not see any weapons namely a knife or anything of the sort and that if he had in fact seen that they were in possession of any dangerous weapons, he would have used his firearm instead of the paintball gun.

[99] Firstly and with reference to paragraph 3.2 of the defendant’s plea, the evidence by Nzama referred to in the preceding paragraph is at odds with and inconsistent with paragraph 3.2 of the defendant’s plea in that save for stating that one of the persons in the group threw a bottle of Savanna at them, Nzama did not state that the Tanzanians were ‘*violent people who attacked the said security guards*’.

[100] Secondly and predicated of the principles enunciated in the SCA judgements of *Crown Chickens* and *Petersen*, the conduct, namely the firing and discharge of the paintball projectiles at the Tanzanians was not a reasonable response to the situation that presented itself, namely that one of the Tanzanians throwing a bottle of Savanna at them,

which bottle did not hit either him or his two colleagues and the bottle landed in front of them on the ground.

[101] Viewed objectively, the conduct of discharging and firing paintball projectiles in response to one of the Tanzanians throwing a bottle of Savanna at the defendant's security guards was not a reasonable response, more so not a response to a 'dangerous situation' and the defendant's apprehension and belief in acting as they did is not sufficient.

[102] The evidence of the plaintiff and Masikhane and that of the defendant's sole witness namely Nzama (documented in this judgement) speaks for itself and objectively demonstrates that the defendant's security guards did not act out of necessity and justification when they discharged the paintball projectiles.

[103] It is also important to note that during clarification by the Court in regard to the direction in which the defendant's security guards discharged the paintball projectiles, Nzama confirmed that when the paintball rifles were fired they were facing an easterly direction namely towards the St. George's arcade and fired the paintball rifles in the direction in which the plaintiff was walking in, namely in a westerly direction.

[104] In this regard Nzama made reference to exhibit 'B7' and 'B8'. Exhibit 'B8' depicts a street vendor steel table and Nzama marked with an X the location where the Tanzanians were situated whilst they faced the defendant's security guards. Consequently, the defendant's security guards should have and ought to have foreseen that the discharge of the paintball projectiles would have made contact with pedestrians who were behind the Tanzanians, that is to say facing the backs of the Tanzanians.

[105] Adverting to the defendant's disputation that the plaintiff sustained an injury to her right eye in consequence of the discharge and firing of the paintball projectiles, in consequence of :

- (a) the defendant admitting that the plaintiff was injured in the location of her eye 'at around the same time' of the incident;
- (b) Nzama stating during the course of his evidence in chief that "*the way she was crying it was a sign that she got hit on her eye*";
- (c) the plaintiff at that moment feeling a pain in her right eye, her identification of the injury to her right eye and a similar identification by Masikhane shortly thereafter and the security guards subsequent apologetic conduct;
- (d) Masikhane stating in his evidence in chief that he had met and seen the plaintiff within one to two minutes after hearing the '*swishing sound with a thud at the end*';
- (e) the undisputed Addington Hospital medical records of the plaintiff namely exhibits 'A12' to 'A16'; and
- (f) the undisputed McCords Hospital medical records of the plaintiff, namely exhibits 'A17' to 'A21';

the plaintiff has established on a preponderance of probabilities that she suffered an injury to her right eye from the discharge and firing of the paintball projectiles from the paintball rifle by the defendant's security guards.

[106] In *Minister of Safety and Security v Van Duivenboden* the SCA held that:⁵

'A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.'

[107] In view of the conspectus of the viva voce and documentary evidence (see paragraph 105 above) before me, I am satisfied that there is a causal nexus between the firing and discharge of the paintball projectiles from the paintball rifle and the injury sustained by the plaintiff. The wrongful conduct of the defendant's security guards was the most probable cause of the plaintiff's injury to her right eye.

⁵ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 25.

[108] The test for negligence was addressed in *Kruger v Coetzee*⁶ where the proper approach for establishing the existence, or otherwise, of negligence was formulated by Holmes JA as follows:

‘For the purposes of liability *culpa* arises if—

- (a) a *diligens paterfamilias* in the position of the Defendant—
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the Defendant failed to take such steps.’

[109] Based on the objective facts and the evidence by the defendant’s witness Nzama, that save for the bottle of Savanna being thrown at the defendants security guards, and quite contrary to what was pleaded in paragraph 3.2 of the defendants plea, the court finds that the defendants security guards were not ‘*confronted by a crowd of violent people who attacked the said security guards*’; consequently the defendants security guards were not faced with a ‘dangerous situation’ and were not justified in discharging the paintball projectiles.

[110] In regard to cross-examination by the plaintiff’s Counsel that the defendants security guards ought to have discharged a ‘warning shot’, Nzama stated that there was no warning shot, they just shot at the Tanzanians after the bottle was thrown and according to his training, a warning shot was previously required however a warning shot was not required during the present training that they underwent.

[111] Having regard to the aforementioned facts and findings, as a trier of fact I am persuaded that the plaintiff has proven negligence on the part of the defendant. In my view, the explanation proffered by Nzama is not plausible under the circumstance, in that there were other reasonable measures that Nzama and the defendant’s other two security guards could have taken to prevent the harm suffered by the plaintiff.

⁶ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

[112] It was emphasised in *Kruger v Coetzee* that the reasonable foreseeability of harm, by itself, does not require action to be taken to avert it. Action to avert reasonably foreseeable harm is required only if, in the particular circumstances, the person concerned ought reasonably to have acted.

[113] Nzama's evidence was that the defendant's security guards were justified in dispersing the paintball projectiles at the Tanzanians because one of the Tanzanians who threw a bottle at them '*was a sign that they were declaring a war*'. I am not persuaded that such conduct was justified and necessary and that in so acting, the defendants security guards should have reasonably foreseen that an innocent pedestrian/bystander would have been struck by the paintball projectile more so when the Tanzanians were standing on the pavement: and it would have been reasonably foreseeable that there would be pedestrians who would have been standing and/or walking in either an easterly or westerly direction, in the area/s immediately behind the Tanzanians.

[114] It is trite that there is a constitutional and public law duty on the State to protect its citizens and the State is liable for the failure to perform that duty, unless it can be shown that there is compelling reason to deviate from that principle.

[115] In the context of delictual damages, the test for determining wrongfulness or otherwise of an omission to act is as restated in *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)*:⁷

'Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment

⁷ *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) para 9.

based, *inter alia*, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered.’

[116] The defendant bore the onus to prove that the dispersing and firing of the paintball projectiles at the Tanzanians was justified. The issue of justification was dealt with by Counsel for defendant during closing argument and in the heads of arguments filed on behalf of the defendant. Counsel for the plaintiff also provided the Court with heads of argument and made submissions in rebuttal to the defence of justification raised on behalf of the defendant.

[118] With reference to the defendant’s alternative defence documented in paragraphs 5.2 and 5.3 of the defendant’s plea, namely that the plaintiffs negligence on the date of time of the incident contributed to the harm and damages she suffered and in the further alternative that such negligence be apportioned in terms of s 1 of the Apportionment of Damages Act 34 of 1956; the defendants Counsel did not argue these alternative defences during its address to the court.

[119] The evidence presented before this Court is that the defendants security guards acted in pursuance of their duty to protect themselves upon a Savanna bottle being thrown at the defendant’s security guards, which evidence was wholly inconsistent with the paragraph 3.2 of the defendant’s plea whereat the defendant stated that its security guards were confronted by a crowd of violent people who attacked the security guards. In my view, the evidence of Nzama did not amount to any justification or a necessary act of discharging and firing paintball projectiles at the Tanzanians.

[120] Both the defendants security guards ought to have foreseen the danger in discharging and firing the paintball projectiles at the Tanzanians and in this regard it was reasonably foreseeable that there would be pedestrians who would have been standing and/or walking in either an easterly westerly direction, behind the Tanzanians. Moreover,

viewed objectively, the conduct of discharging and firing paintball projectiles in response to one of the Tanzanians throwing a bottle of Savanna at the defendant's security guards was not a reasonable response more so not a response to a 'dangerous situation'.

[121] In my judgement and having regard to the overall conspectus of the evidence adduced by the plaintiff and Masikhane in regard to the incident which took place on 18 February 2020; the plaintiff has established on a preponderance of probabilities, that the defendant's security guards acted wrongfully and negligently in firing and discharging the paintball projectiles from the paintball rifle.

[122] In objectively assessing and analysing the circumstances of the incident, and having regard to evidence adduced by the plaintiff and Masikhane, in contradistinction to the evidence of Nzama, I am satisfied and persuaded that the plaintiff has proven negligence and wrongfulness on the part of the defendant.

Conclusion:

[123] The plaintiff has on a preponderance of probabilities established that the defendant's security guards act of dispersing and firing the paintball projectiles from the paintball rifle was negligent.

[124] I am not satisfied that the defendant has discharged the onus of proving that its security guards act of dispersing and firing the paintball projectiles were justified. I find that their conduct was wrongful and unlawful consequently, the defendant is vicariously liable for the injuries sustained by the plaintiff.

Order:

[125] The following order shall issue:

1. The defendant is ordered and directed to pay the plaintiff 100% of her proven damages arising from the injuries she sustained in an incident which occurred on 18 February 2020.
2. The defendant is ordered and directed to pay the plaintiff's taxed or agreed party

and party costs on scale C, such cost to include the costs of Senior Counsel, including Counsel's preparation for trial, consultations with witnesses and heads of argument.

3. The defendant is ordered and directed to pay the interpreter's fees for 1 and 2 September 2025.

RAMDHANI AJ

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