



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 402/2020

Reportable	Yes/No
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In the matter between:

SIPHELELE TOTSEKA

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] Mr Totseka (the plaintiff) instituted an action against the Minister of Police (the defendant) claiming damages for the alleged assault. The assault was allegedly committed by the members of the South African Police Services (SAPS) who were acting within the course and scope of the defendant's employment.

[2] In these proceedings, the focus is solely on the merits, as the application to separate the issues was granted in terms of Rule 33(4) of the Uniform Rules of Court.

The plaintiff's case

[3] The plaintiff presented the following evidence: On 18 July 2019, the plaintiff, a Grade 10 learner at Madala Senior Secondary School, assembled for prayer as per his school schedule. Instead of singing the usual gospel songs, he, along with his fellow learners, initiated a protest concerning the dilapidated state of the school's infrastructure. According to the plaintiff, the school toilets were blocked, and windows were cracked, exposing them to harsh weather conditions.

[4] The protest proceeded outside the school premises and along the N2 public road, blocking traffic that was moving in both directions. They placed stones, foreign objects and burnt tyres. A truck driven by police arrived at the scene whereupon the learners were teargassed. They ran inside the school yard and continued protesting. The police truck left the scene.

[5] While they were singing, a police Avanza arrived. Police officers with uniform and the name tags on exited the vehicle, with one standing on the opposite side of the fence. The plaintiff proceeded to his classroom to fetch his schoolbag and decided to leave the premises thereafter. He explained that he felt

uncomfortable with the manner in which the protest was progressing, and no longer wished to participate.

[6] As the plaintiff was exiting the school yard, he saw the police officer at a distance of approximately 15 paces pointing a firearm at his direction. He then heard a gunshot towards his direction. He called for help and Mr Vuyani Qalashe (“Mr Qalashe”), one of the teachers came to assist as he was bleeding profusely on his arm.

[7] Mr Qalashe asked if he could identify the police officer who shot him and he answered affirmatively. They went to the location of the police officer. The police officer who was identified as Constable Velembo (“Const. Velembo”) had moved from his initial spot and was now standing in the middle of the tarred road.

[8] The plaintiff pointed Const. Velembo to Mr Qalashe who then confronted him about shooting a student. Const. Velembo denied firing a shot. Mr Qalashe asked him to call an ambulance, he refused. Mr Msebenzi, a teacher took the plaintiff to Mthatha General hospital. After being treated, the medical personnel advised him to go to Bedford hospital for further treatment.

[9] The wound became septic, after being cleaned at Bedford hospital requiring further treatment, which he received. The medical report by Dr Sifumba (“the Dr”) confirmed bullet hole on the plaintiff’s right arm. During medical examination, his arm was bleeding profusely, and he was complaining

about the excruciating pain. The Dr noted a significant drop in blood pressure and a fracture of the humerus in the right arm.

[10] In his testimony, Mr Qalashe confirmed that police officers were called during the protest at the school. He testified that Const. Velembo, denied shooting the plaintiff despite being identified as the shooter and also refused to take the plaintiff to hospital or call an ambulance.

[11] After Mr Msebenzi left with the plaintiff to hospital, Mr Qalashe found empty cartridges at the scene. Const. Velembo attempted to retrieve them, but Mr Qalashe refused. He identified marks on the cartridges, P15 and P18. The empty cartridges were presented to the court as exhibits. With this evidence the plaintiff closed his case.

The defendant's case

[12] Const. Velembo testified that he went to school with Sergeant Nonti after hearing about the strike action. They introduced themselves to the students who were singing at the protest. He described the scene as chaotic with students throwing stones to road users. He further testified he heard gunshots, however he did not see where they were coming from.

[13] According to Const. Velembo, upon the vehicle's arrival at the scene, an injured student accompanied by the school teacher approached the vehicle, where he was mistakenly identified as the shooter. He testified that there was

no way he would ever shoot a student under such circumstances. He maintained that he did not fire the shot that injured the plaintiff.

[14] During cross-examination, he testified that he did not see Mr Qalashe picking up the cartridges, however, confirmed that P-labelled cartridges belong to the SAPS. He informed the court that it was Public Order Police Squad (POPS) that shot the student, not him.

Issues

[15] The issue to be determined is whether the member (s) of the defendant are liable for assaulting the plaintiff.

The legal framework

[16] In civil proceedings, the plaintiff must, in order to succeed prove his case on a balance of probabilities. In *National Employers General Insurance Limited v Jagers*¹, Eksteen AJP (with Zietsman J and Van Rensburg J concurring) held:

‘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

¹ 1984 (4) SA 437 (E) p 440 D- G.

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.'

[17] In delictual claims specifically assault, the onus rests on the plaintiff to prove his case on a balance of probabilities. Once the commission of assault is proved, the defendant is burdened with a duty to satisfy the court that the assault was justified. In *Mabaso v Felix*², Wessels JA, (with Diedmont and Trollip AJA concurring) held,

'Headnote:

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...'

[18] In both civil and criminal law, the definition of assault is the same. In his body of work, CR Snyman defines assault as an offence consisting of unlawfully and intentionally act or omission which results in another person's bodily integrity being directly and indirectly impaired or inspiring a belief in another person that such impairment of her bodily integrity is immediately to take place to him/her.³ In the law of delict, assault is recognised as *actio*

² 1981 (3) SA 865 (A).

³ Snyman's Criminal Law, seventh edition updated by SV Hoorntje at p395.

iniurium. It is defined as an infringement of the right to bodily integrity, both physically and psychologically.⁴

The court's analysis of evidence

[19] This court acknowledges that the plaintiff is a single witness regarding the assault and therefore his evidence should be treated with caution. In this regard, I am fortified by the provisions of 16 of the Civil proceedings Act⁵ which provides that judgment may be given in any civil proceedings on the evidence of any single, competent and credible witness.

[20] My observation is that the plaintiff, though a single witness on the issue of assault gave a clear and chronological exposition of events. Furthermore, there is some corroboration in the plaintiff's evidence.

[21] To be specific, the injuries sustained by the plaintiff, including the gunshot heard by both Mr Qalashe and Const Velembo, corroborate the plaintiff's version that he was indeed shot.

[22] Regarding the identity of the shooter, there is consistency in the plaintiff's version which is also corroborated by Mr Qalashe's testimony who heard the gunshot, attended to the injured plaintiff and later confronted Const. Velembo about the incident.

⁴ JC Van Der Walt and JR Midgley, *Principles of Delict* 3 ed et 111 para 78.

⁵ Act 25 of 1965.

[23] Moreover, the circumstantial evidence in Mr Qalashe's testimony strengthens the plaintiff's version that he was shot by a police officer. The collection of the empty cartridges at the scene, identified with a 'P' symbol, establishes a reasonable inference that the police officer, indeed, shot the plaintiff and no one else.

[24] Furthermore, Const. Velembo's admission that POPS (police officers) shot the students and that the empty cartridges collected at the scene belong to the police provides credence to the plaintiff's version regarding the assault.

[25] Resultantly, I find the defendant liable for the plaintiff's assault which was intentionally perpetrated by its member, who deliberately fired a shot, causing severe injuries. At the time he was shot, the plaintiff was carrying his school bag in an attempt to leave the school premises. Therefore, the events as explained before this court render the defendant's actions unjustified.

Order

[26] The following order is issued:

1. The defendant is 100% liable for the plaintiff's proven damages.
2. The defendant shall pay costs of this action on scale A as set out in Rule 67A read with Rule 69 of the Uniform Rules of Court.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff	:	Adv L. D. Hlam
Instructed by	:	Jayiya Ngcaba Attorneys Mthatha
Counsel for the Defendant	:	Adv Rili
Instructed by	:	State Attorney Mthatha
Heard on	:	05 November 2025
Judgment Delivered on	:	20 January 2026