NOT REPORTABLE

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

CASE NO. 3050/2019

In the matter between:

NOMSA DYIBISHE Plaintiff

and

MINISTER OF POLICE Defendant

JUDGMENT

HARTLE J

Introduction:

[1] The plaintiff sued the defendant for damages arising from an assault alleged to have been perpetrated against her at Bathurst on 29 January 2019 by members of the South African Police Service ("the police"), for whose conduct she asserts the defendant is vicariously liable.

[2] She claims that the police harmed her either intentionally or negligently by shooting at her with a firearm(s) or discharging (a) firearm(s) in her direction or in her presence, striking both her legs with rubber and live ammunition bullets/projectiles thereby causing injury to her body and consequently damage, which she seeks to recover in the action that came before me on trial.

[3] The shooting was alleged to have happened inside a house situated at Erf 1035 in Memani Street, Bathurst, which it is common cause is the home of one of the plaintiff's witnesses, Ms. Bulelwa Zweni ("the Zweni homestead").

[4] The shooting alleged by the plaintiff happened to coincide with protest action by the Bathurst community carried on in close proximity to the Zweni homestead which - latterly conceded in an amended plea, culminated in the need for the dispatch of the Public Order Policing Unit of the defendant ("POPU") to the Nolukhanyo township in Bathurst on that day in order to crowd manage and restore public order.

The pleadings:

[5] The defendant initially pleaded a bare denial of all the allegations, admitting only the plaintiff's name and that the issue of the summons had been preceded by the delivery of the formal statutory notice of intention to institute legal proceedings.

[6] However, shortly before the trial commenced - by agreement between the parties only on the separated issue of merits, the defendant filed an amended plea in which, apart from eschewing reliance on a special plea that had been taken to the plaintiff's particulars of claim,[1] he further purported to amplify his hitherto bare denial as follows:

> "5.3 In amplification of the denial the defendant pleads as follows:
>
> 5.3.1 On 29 January 2019 there were service delivery related protest action in the Bathurst, Bathurst Township and surrounding area by the Bathurst Community.
>
> 5.3.2 The Public Order Policing Unit (POPs) of the South African Police Service (SAPS) attended to crowd management duties thereat.
>
> 5.3.3 The Commanding Officers on duty at all material times were Warrant Officer Bishops and Captain Mhlauli. In particular Captain Ntloko was the Commanding officer in charge of the protest action scene during the time of the plaintiff's alleged shooting and was in charge of the scene and the implementation of the POPs/SAPS tactical plan.
>
> 5.3.4 It is denied that any member of SAPS discharged live ammunition in that all SAPS members employed the following measures to manage the violent and imminent attack by the protesters on SAPS members or in managing the crowd:
>
> 5.3.4.1 stunt grenades;

[1] The special plea (which asserted that the plaintiff's claim was unenforceable in law for want of compliance with the provisions of section 2 (2) of the State Liability Act, No. 20 of 1957, read together with the provisions of section 5 (1) of the Institution of Legal Proceedings against Certain Organs of State Act, No. 40 of 2002) had already been withdrawn by a notice filed on 30 January 2020.

5.3.4.2 gas/smoke screen;
5.3.4.3 rubber bullets and stoppers which were discharged through shotguns

5.3.5 The use of the above tools was reasonably necessary and proportional in the circumstances as the protestors were committing various acts of crime, posed a threat of serious violence to the other protestors, members of the community and the members of SAPS and were resisting the efforts by SAPS members to apprehend the protesters or those who were committing offences in the presence of SAPS members. The conduct of the members of SAPS was at all material times in accordance with section 49 of the Criminal Procedure Act 51 of 1977 (the CPA).

5.3.6 It is denied that the members of the SAPD entered the property described by the plaintiff at paragraph 5 of her particulars of claim[2] and shot her." (Sic)

[7] Surprisingly, the plaintiff did not object to the late amendment although it posed an odd conflict to the remaining passages of the plea that put her to the proof of almost every allegation made by her, even the basis for the jurisdiction of this court and the allegation that the members that she claimed assaulted her (who according to the amended plea were certainly present in the area at the relevant time and had taken charge of the environment under the auspices of a POPU/SAPS tactical plan that had entailed at the very least the discharge of rubber bullets and stoppers through shotguns)[3] were employed by the defendant and acting within the course and scope of their employment with the police service whilst so doing.

[8] Some of the anomalies by the amendment were picked up on by Mr. Olivier, who appeared for the plaintiff, in passing in his opening address but he confirmed that there was no objection to the plea being amended and indicated that he held

[2] This is a reference to the Zweni homestead referred to above.
[3] One of the material facts relied upon by the plaintiff is that she was harmed by the police using both live ammunition *and* rubber bullets.

instructions to continue with the trial since there was no effect to the matter thereby whatsoever.[4]

The statutory context:

[9] It was somewhat of a misconception however to imagine that the amendment would not be problematic in relation to the defendant's still bald denial that his members had harmed the plaintiff especially when one has regard to the import of, firstly, the applicable provisions of the Regulation of Gatherings Act, No. 205 of 1993 ("the ROGA") - read together with National Instruction 4 of 2014 Public Order Police: Crowd Management During Public Gatherings and Demonstrations ("the National Instruction") under which collective provisions the POPU would have assumed control over the crowd management environment and have been legally obliged to regulate it and to restore public order said to have been compromised by the claimed threats of serious violence relied upon in the plea[5] and, secondly, the kind of justification envisaged by section 49 of the Criminal Procedure Act, No. 51 of 1977 ("CPA").[6]

[4] Evidently however counsel had serious misgivings about the amended plea later on during the trial. (Transcript: Vol 2 at page 16 and 32 and Vol 3 at page 5).

[5] The provisions of the ROGA must be read together with National Instruction 4 of 2014 Public Order Police: Crowd Management During Public Gatherings and Demonstrations ("the National Instruction") which sets the standard for the policing by POPU of public gatherings, the combatting of serious and violent crimes including stabilizing outbreaks of public violence incidental to crowd gathering during such management, the rendering of specialised operational support to other police components or divisions, and information management.

[6] The defendant denied both allegations, firstly that his members shot the plaintiff by discharging a firearm, rubber bullets, projectile or live ammunition and, secondly, that they entered the Zweni homestead and shot her there yet the amended plea impliedly conceded possible, but justifiable, harm. Further, by necessary implication, a physical connection by a peace officer with the plaintiff in order to arrest her must be assumed as well as harm caused to her in the course of such arrest, or why else would the provisions of section 49 find application at all? It's very *raison d'etre* is to justify the application of deadly force in circumstances where an arrest is playing itself out.

[10] Both of these justification measures empower the police to use force that would otherwise be obviously wrongful to impose upon a civilian.[7]

[11] Section 9 (2) of the ROGA, for example, permits the use of force (but excluding the use of weapons likely to cause serious bodily injury or death)[8] to disperse participants in a gathering or demonstration,[9] or force entailing the use of a firearm and other weapons to prevent or quell serious violence or damage to property in a crowd gathering environment provided the degree of force which may be so used shall not be greater than is necessary for the prevention of the illegal actions aforementioned, and are required to be moderated and proportionate to the circumstances of the case and the object to be attained.[10] Were it to be contended (as it was in fact the case in this instance) that the plaintiff got hurt in the course of

[7] See the object of the ROGA and the general tenor of its provisions which seek to balance the competing interests of the police obliged to ensure public order during public gatherings and demonstrations by the use of force if necessary against the right of every citizen to assemble peacefully and unarmed, to gather and demonstrate etc., and to enjoy the protection of the State while doing so.

[8] Apart from the injunction in the ROGA itself to exclude weapons likely to cause serious bodily harm, the National Instruction endorse this approach in paragraph 14 thereof. Leave aside the manner in which the use of force is to be applied to minimise or avoid serious injuries, the use of pepper spray and teargas (CS), for example, are generally not permitted. The use of firearms and sharp ammunition including birdshot (fine lead pellets) and buckshot (small lead pellets) are prohibited. Rubber rounds may only be used as an offensive measure to dispel a crowd in extreme circumstances, if less forceful methods have proven ineffective.

[9] Such force is aimed at dispersing the persons gathered, the degree of which shall not be greater than is necessary to disperse the persons gathered and shall be proportionate to the circumstances of the case and the objects to be attained. (See section 2 (b) and (c) of the ROGA.)

[10] See sections 2 (d) and (e) of the ROGA read together with paragraph 14 of the National Instruction. The purpose of offensive action must be "to de-escalate conflict with the minimum force to accomplish the goal and … the success of the actions will be measured by the results of the operation in terms of loss of life, injuries to people, damage to property and cost."

a crowd gathering operation for such a reason,[11] one would have expected the defendant pertinently to have admitted not only that offensive measures[12] were taken in relation to the plaintiff by shooting her (or at least by shooting in her presence), but also the "riot damage" caused thereby,[13] and thereupon to plead grounds for justification.

[12] Section 49 of the CPA, the measure which the defendant pleaded its actions accorded with at all material times, however, also gives police officers legal justification in certain circumstances to use force in carrying out arrests, which were alleged in the defendant's amended plea to have been purportedly inevitable and necessary in these circumstances arising from the crowd management operation but it has not contended contrariwise that she was arrested or that any peace officer purported to arrest her at the scene.

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[11] The defendant referred to the gathering as "service delivery related protest action". A gathering is defined in section 1 of the ROGA as "any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act No. 29 of 1989), or any other public place or premises wholly or partly open to the air—

(*a*) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or

(*b*) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution;".

A "demonstration" in turn "includes any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.".

In paragraph 2 of the National Instruction "crowd management" means "the policing of assemblies, demonstrations and all gatherings, as defined (in the ROGA), whether recreational, peaceful or of an unrest nature." Although the defendant did not concede any injury to the plaintiff, the fallback defence is that if she was injured by the police she must have gotten struck for such a reason or in the course of managing the crowd gathering.

[12] "Offensive measures" is defined in paragraph 2 of the National Instruction as referring to "reactive tactical measures required to normalise a situation and includes search and seizure, pushback, evacuation, encircling and dispersal and requires the systematic escalation of appropriate force." By contrast "defensive measures" refer to "pro-active tactical measures such as static barriers (which are used to protect and safeguard people or property), negotiation, cordoning off, block, isolate, patrol, escort and channel."

[13] "Riot damage", in section 1 of the ROGA, means any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering.

[13] This section provides as follows:

> **"49. Use of force in effecting arrest.**—(1) For the purposes of this section—
> (*a*) **"arrestor"** means any person authorised under this Act to arrest or to assist in arresting a suspect;
> (*b*) **"suspect"** means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and
> (*c*) **"deadly force"** means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.
> (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if—
> (*a*) the suspect poses a threat of serious violence to the arrestor or any other person; or
> (*b*) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later."

The impact of the defendant's amended plea:

[14] Rule 22 (2) of the uniform rules of court behooves a defendant to either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration and to state which of these said facts are not admitted and to what extent and shall clearly and concisely state all material facts upon which he relies.

[15] In this instance the defendant in my view opportunistically failed to engage responsibly with the material facts (most especially accepting as a premise that the plaintiff was harmed by being shot at and struck) despite the very onerous burden placed upon the specialised members of POPU by the provisions of the ROGA, read

together with the National Instruction, to be accountable[14] for such an operation undertaken at the scene of protest action including any "riot damage" that arose therefrom.[15]

[16] Further, the acknowledgement by the defendant that his specialized unit took charge of the crowd gathering scene or environment on the day and at the time of the plaintiff's claimed shooting and that certain measures were in fact employed to manage the alleged "violent and imminent attack by the protestors on SAPS members or in managing the crowd" coincidentally very much put the defendant's members on the scene for legitimate operational functions under the provisions of the ROGA. Therefore, the defendant ought at least to have conceded that the members meeting their constitutional policing functions were conducting themselves as such, in Bathurst, on the day and at the time the plaintiff says she was injured, at a place that resorts within this court's area of jurisdiction. Against such a premise it could then be fairly concluded that the members concerned were certainly acting in the course and scope of their employment with the defendant as such.

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[14] I do not mean in this sense necessarily liable in delict but constitutionally accountable to ensure the maintenance of public order during public gatherings and demonstrations, to regulate such an environment and, if violence is anticipated or has occurred during any such environment, to restore public peace.

[15] Accountability endures after the event as well in the form of reporting and detailed record keeping on *IRIS* (the Incident Registration Information System used by the police service as a database to record incidents and store information), the handing in and preservation of video footage (according to paragraph 4 (4) of the National Instruction video camera operators must be designated and employed by the information manager at all events to monitor the event with evidence based video footage regarding events that have been identified in the threat assessment), the opening of relevant case dockets, and ultimately a debriefing where lessons are learnt from incidents so as to be discussed and incorporated into maintenance exercises at unit level to ensure POPU members' readiness for operational deployment in the future. The extent of scrutiny and level of accountability envisaged by the National Instruction simply does not accord with the defendant pleading a bald denial of riot damage arising during the implementation of a POPU/SAPS tactical plan or putting persons harmed during such operations to the proof of such damage. The POPU has a clear obligation in terms of the National Instruction to be "accountable" then in this sense for any collateral damage arising. It is in no position to throw up its hands and suggest that it has no knowledge of it when harm has been occasioned to civilians under its watch. It must be able to give a full account of the incident from the planning stage through to its execution and of any fallout. Any arrest carried out during such an operation would also be important for the POPU to own as a vital feature or incident thereof.

[17] One would also have expected the defendant to have acknowledged the presence of the plaintiff in the area and the possibility of her having got in harm's way as it were either as being co-incidentally in the midst of the crowd management environment, a participant in the gathering or demonstration, or one falling foul of the provisions of ROGA or other law, who happened to have been present (on the defendant's version of what went down) when the offensive measures adopted according to the tactical plan were carried out by POPU, or arrests were effected, but no such admission (or even possibility) was pleaded.

[18] The defendant's direct invocation of section 49 of the CPA in any event further logically presupposes an arrest of the plaintiff or reason to have arrested her (in the sense of her having been a "suspect"), that she was fleeing or attempting to flee during an attempt to arrest her while being aware that such an attempt was being made, and more especially that "deadly force" was in fact used, which violation of her bodily integrity would otherwise be entirely wrongful in law.

[19] It makes no sense in either justification scenario outlined above then for the defendant to have purported to deny that the act complained of by the plaintiff was done unlawfully without agreeing that the act was done in the first place. But deny the defendant did (baldly that the plaintiff was harmed by the police or at all in fact), whilst reserving unto himself the right to argue, only if the plaintiff succeeded in proving that the police shot her in such manner and place as she describes in her particulars of claim, that such shooting was legally justified.

[20] Although an arrest in terms of the provisions of the CPA could arise naturally after or following a dispersal manoeuvre under the ROGA or in consequence thereof, the defendant seems to have conflated the two justification scenarios in the amended

plea whereas each come with their own unique legal requirements.[16] The defendant would however certainly have attracted liability by reason of a resort to either peculiar measure, whether the alleged harm is said to have arisen under the watch of the POPU during the execution of the tactical operation, or afterwards by the local police purporting to carry out arrests as part of their ancillary policing functions. Here the context was a fluid scene of a claimed unrest situation or crowd gathering that required offensive measures to be put in place and which culminated in arrests, although ostensibly not of the plaintiff. Reading between the lines the subtext for the possible entitlement to arrest (and use of deadly force *vis-à-vis* the plaintiff) is reliant on an inference in the first place that she was acting criminally, but in order to get to that determination this court is asked to find that because she was injured by being shot in her legs (a state of affairs that she was required first to prove but which admission the defendant seriously resisted making), it must be inferred that she was therefore amongst those being dispersed because she had acted unlawfully.

[21] Not only was the plea confusing, but it considerably lengthened the proceedings since the plaintiff was obliged to establish every material fact she relied upon, most notably that she had been shot or injured at all (despite official records amongst the defendant's own discovered documents objectively recording that she suffered gunshot wounds contemporaneously with the execution of the operation

[16] Paragraph 5.3.5 of the amended plea seems to have cobbled together elements of both section 9 (2) of the ROGA and section 49 of the CPA.

and had to be removed from the crowd management scene by ambulance) and, more significantly, that the perpetrators of the shooting were in fact police officers.[17]

[22] The strange manner of pleading also affected the incidence of where the onus lays because in a proper invocation of the provisions of section 49 of the CPA that assumes an arrest *by a peace officer* in the first place the defendant would bear the onus to establish justification for the use of deadly force as contemplated by that section in the course of a police officer carrying out such an arrest.[18]

[17] It is quite ironic that each of the plaintiff's witnesses were further challenged how they could know from the apparel of the shooters that this was the official uniform of the police, whereas the National Instruction requires members to be dressed in field dress or the prescribed cover-alls (rather than civilian clothing) in order to display uniformity and professionalism. Section 8 (8) of the ROGA further provides that no person shall at any gathering or demonstration wear any form of apparel that resembles any of the uniforms worn by members of the security forces, including the Police and the South African Defence Force.

[18] See *Mabaso v Felix* [1981] 2 All SA 306 (A). On behalf of the defendant it was contended instead that the plaintiff bore the onus to establish all the elements of her claim and to advance a justification in terms of section 49 of the CPA in respect of any shootings which occurred or might be found by this court to have occurred within the context of the "unlawful Bathurst riots" of 29 January 2021. This cannot however be a correct supposition. Even if the defendant has pleaded conditionally, by implication it is suggested that the shooting happened in circumstance where grounds postulated by section 49 of the CPA were present. This kind of detail justifying or excusing the application of deadly force is peculiarly within the defendant's own knowledge and not the plaintiffs. Only the police purporting to arrest the plaintiff, if they were, can answer why they employed the degree of force in question. The same would in my view apply in a situation where the police have invoked the power to harm under section 9 (2) of the ROGA. Both justification measures present "special defences" in the sense of being a confession and avoidance of the plaintiff's claim in which scenarios the onus of proving the avoidance rests upon the defendant.

[23] In this respect the premise of the defendant's case rested especially on documentation that the parties had agreed upfront would be referred to at the trial, the authenticity of which the defendant strongly vouched for.[19] Although the parties' agreement did not extend to the truth of the contents of any document in particular referred to, the import of the parties' pretrial concessions at least confirmed that each document was what it purported to be and that the documents included in their respective bundles were admissible in evidence without formal proof. In my view the documentation that was discovered by the defendant and especially relied upon contains its own seemingly cohesive narrative of the salient features of the incident or event at least from the perspective of a crowd management operation and what is expected to be officially recorded in such a context.

[24] The official records foretold for example that several rounds were in fact discharged by the police on that day and during the implementation of the POPU/SAPS' tactical plan at the scene, including in fact live ammunition earlier that

[19] The defendant should certainly be able to assert that its maintained records are authentic and ought to carry weight at least in the sense of what they purport to be. The National Instruction obliges the POPU to record incidents and store information on the Incident Registration Information System ("IRIS"). Paragraph 4 (2) of the National Instruction provides for Information Management as follows: "In order to achieve the above, every POP commander must ensure that information is managed effectively. This includes acquiring and capturing all relevant tactical and operational information on the functions of POP, as well as on all *public order* incidents, events or operations and ensuring a constant flow of accurate information on the incident, event or operation. This includes the planning of operations, coordination of information and reporting of preview information to the national office. The relevant Information Management manual and related directives and instructions must be adhered to." Paragraph 4 (3) provides that: "Every POP commander must ensure that all notices in respect of his or her area of responsibility is captured within one hour after becoming aware thereof and monitor all information registered on IRIS to ensure data integrity. All units must at least have one person per shift who register incidents on IRIS and at least one IRIS controller per unit to monitor data integrity on IRIS." Paragraph 17 also provides for the extent of reporting that is required to be maintained during an operation and afterwards, and in ensuing *sequalae* (see paragraph 18) such as for example when dockets pertaining to investigations are opened, reports are made to the Independent Police Investigative Directorate where force has in fact been used to disperse crowds, and where criminal charges are laid. Even subsequent debriefing sessions have to be recorded in terms of paragraph 19. A video camera operator especially trained and designed to record incidents of crowd management is also required to be on hand and to monitor events with video based footage especially focussed on the threats that have been recognized in the assessments of each situation.

afternoon.[20] The official documentation also heralded that the plaintiff had suffered gunshot wounds on the same day and at the time of the implementation of the plan under the watch of POPU and that she was transported away from the scene by ambulance because of her serious gunshot injuries.

[25] For this reason, it appeared strained that so much contention arose in the trial around the issue of whether the plaintiff was shot at all, or injured, and, if so, with what and by whom, whereas the defendant's amended plea (especially paragraph 5.3.5 thereof) was (and is) in my view capable of being read as an implied admission that the defendant's members acting under the operational command of one Captain Ntloko ultimately had at the relevant time at the very least fired rubber bullets that could have struck and injured the plaintiff as claimed by her.

[26] The defendant's plea might be termed a variation of a bare denial or a bare denial with a twist (but without him investing himself in the variables or the twist) that the court strongly criticized, albeit in the context of upholding an exception, in the matter of *Nqupe v MEC, Department of Health and Welfare, Eastern Cape Province*.[21] In that matter it was observed that it is not "technically adequate" to plead a non-admission of facts in circumstances where it results in the plaintiff being left in doubt about the extent of the non-admission especially where the facts stated in the pleadings do not suggest any reason why the defendant would have no knowledge of the particular fact relied upon. In the context of the defendant's plea, having conceded a shooting during the ROGA operation that it has supreme control

[20] In the JOC occurrence register, serial number. 40, an entry relevant to events at 12h19, records that Warrant Officer Abrahams fired three live rounds of ammunition in the ground. It matters not that the officer is from the South African Police Service as opposed to POPU. The significance is that live ammunition was fired during the course of the crowd management operation under the command of the POPU whereas it is not approved of in terms of the National Instruction amongst ROGA's offensive measures to be employed.
[21] [2006] JOL 16933 (SE).

over, and during which the defendant accepts that their members discharged rubber bullets at least in a scenario where reliance is placed upon a purported justification in terms of section 49 of the CPA to have used force, it makes no sense to then have denied a shooting of some kind, or harm for that matter.

[27] Reading between the lines, as the court was obliged to in *Sokompela v The Minister of Safety and Security*,[22] the defendant's plea was in my opinion not really one of a denial of the assault. Instead, I regard it as a true case of confession and avoidance which has influenced the approach I adopt herein.

Other challenges:

[28] Something else happened before the trial commenced which also led to an awkward and sensitive situation. The plaintiff had sought to file expert notices and summaries of doctors that were delivered out of time and to which the defendant objected. Evidently these experts, Doctors Sauli and Naiker respectively, would have confirmed more definitively that the plaintiff had in the first place been injured and with what object or tool. This would have put it beyond the pale so to speak that the bullets or projectiles lodged in her flesh, and which were later removed by surgical procedure, had come from the defendant's arsenal as it were. I understood that the intention was that such an opinion might be formed in consequence by a specialists in ballistics who the plaintiff ultimately never qualified. The plaintiff in fact withdrew these notices and took up the challenge to prove that she had been injured by police officers on the scene and her counsel awkwardly sought to establish without the benefit of expert ballistic evidence that she had been shot with

[22] [2003] JOL 11382 (Tk).

ammunition that was commonly in use by the police.[23]

[29] Whatever difficulties the plaintiff may have brought upon herself by making the concessions which she did, I mention as an aside that in these unique circumstances and the complex nature of operations conducted under the provisions of the ROGA where riot damage is acknowledged in official documentation to have resulted, the parties should before the trial had commenced meaningfully have engaged with each other to properly explore the exact areas of contention against the spectre of the provisions of the ROGA in particular, by focusing on the implied concession that the plaintiff had in fact been injured, albeit in circumstances where it was suggested she was being arrested or had a reason to be arrested for her participation in the protest action and got hurt in the course of such arrest.

[30] As it turned out, even the invitation extended to the defendant to concede the issue of the jurisdiction of this court was ignored.

[31] Whilst in a criminal trial it is perfectly permissible to simply put the state to the proof of every allegation and for the accused person to count it as one's fortune

[23] In a rule 37 minute that preceded the filing of the amended plea the plaintiff had sought certain admissions, namely, that she had been struck with a rubber projectile in the left lower leg and with live ammunition/projectile in the lower right leg; that she had been admitted to the Port Alfred Hospital where she received treatment for the wounds; that she had suffered the injuries set out in the medical records and photographs that had been discovered and provided to the defendant; that at the time (the minute is dated 22 April 2021) the rubber bullet was still lodged in her lower left leg; and that on 1 April 2019 the plaintiff had undergone a procedure by Dr. Sauli at the hospital for the removal of four X foreign objects from her right lower leg which were removed and handed to a member of the South African Police Services by the name of Sikoko. The defendant's response recorded in the minute is as follows: "The plaintiff is referred to the defendant's Plea wherein she is put to the proof of these specific issues." These questions and the response provided preceded the filing by the defendant of his amended plea which, by necessary implication, opened the door for admissions to be made where these were properly warranted.

that it might not be possible for it to meet its onus for one reason or another, in the context of civil trials and especially within the milieu of case management and its objectives, the parties have a mutual responsibility to ensure that areas of contention are sensibly narrowed down. The standard is that litigants through their attorneys are expected to "a material degree" to "promote the effective disposal of the litigation".[24]

[32] In my view the parties ought at the very least to have conferenced again after the amended plea was introduced to consider, against the unique impact of the defendant's revelation that his members had carried out a crowd management operation (by necessary implication under the provisions of the ROGA during which ammunition was discharged), what further concessions could then have been made.

[33] Be that as it may and against that background, I refer to the salient features of the evidence that was placed before me, firstly by the plaintiff who accepted that she bore the onus to prove that she had been shot by the police in the Zweni homestead on that afternoon and as best she could without expert ballistic evidence to establish that the ammunition used belonged to the police.

[34] I should mention that there was a lot of distraction about the precise nature of the injury suffered by the plaintiff and what kind of ammunition could have caused

[24] See Uniform Rule 37 (9)(a)(i) and (ii) which empowers a court to grant a punitive costs order where such an attempt is not made. Albeit in the context of a review application the Supreme Court of Appeal in *Paul Anthony Kalil N.O & Others v Mangaung Metropolitan Municipality & Others* [2014] 3 All SA 291 (SCA) at para [30] - [34) remarked upon the obligation of state officials not to frustrate the enforcement by courts of constitutional rights. The court expressed its disapproval of the unnecessary resort by officials in opposing applications to raising of bald denials without advancing facts to justify these. The court remarked that the manner in which the municipality in that instance had presented its case fell to be deprecated and fell far short of what was expected from an organ of state, the legality of whose actions was in dispute. In the present context, where it was accepted that the plaintiff was injured during the course of a ROGA operation, it seemed wholly inappropriate to have her prove it in the absence of any unique circumstances to have denied such a fact.

it, which I do not consider it necessary to go into. It is in my view a red herring, the only real issue being whether the plaintiff was in fact and on the probabilities harmed by the police during or as a tangent to, or in consequence of, the conceded POPU operation by being shot at, whether with rubber bullets or live ammunition.

Plaintiff's testimony:

[35] Ms. Dyibishe, 52 years at the time of the testimony, confirmed that she was a resident of Bathurst. She was at her own home in the area until about noon on the day in question when she learned that her brother's son had passed away. She proceeded to his home on foot to commiserate with the family and spent approximately four hours with them. On returning to her own home after 4 pm (she estimated that it would ordinarily take her about twenty or so minutes to walk between her home and his) she went along Memani Street where she noticed the presence of uniformed police officers.

[36] She observed that people were running away and being chased by the police. She experienced being "shot" by tear gas which is how she ended up at the Zweni homestead for assistance to ask for water and because she realized that she would not be able to push past the protestors in time to get safety to her own house. She had noticed Ms. Zweni seated on her veranda and approached her for assistance. She observed the crowd coming nearer. They entered the homestead together and Ms. Zweni closed the door behind them. They sat on a bed together inside a closed room.

[37] While so seated she became aware of people running and entering the house who mentioned that they were being chased by the police. She heard windows breaking and the door of the room in which they were seated being kicked open. The

people inside were told by persons who she identified as uniformed police officers, several in number, to come out. They were instructed to look down, which defence mechanism she had resorted to in any event because she was afraid. She remembers being told to walk like a frog and it being announced that they were being arrested. She claims that she did not even have time to respond in the manner indicated by bending her legs and lowering her body down because she felt that she had been shot in both legs by the police who fired at her.

[38] It became "dark" after she was struck and she only regained consciousness later at the Port Alfred Hospital, where it is common cause, she was taken from the scene. She was hospitalized for an initial period of two weeks and for a further fortnight later on again for a subsequent operation to her legs because, as she sought to explain (before Ms. Ntsepe who appeared on behalf of the defendant objected on the basis that she did not have the capacity to form a medical opinion in this respect), the "bullets" she had been struck with were still inside of her flesh.[25] At the time of trial, she was still mobilizing on crutches.

[39] Photographs taken contemporaneously at the trial were tendered into evidence depicting the residual scarring to her legs.[26] These resemble circular, tending towards oval shaped, healed scars. She further identified another photograph taken of her by her nephew at the hospital that evening depicting bandages wrapped around

[25] I do not accept without expert testimony, ballistic or medical, what was extracted from the plaintiff's body but I cannot ignore the objective noting of her treatment received at the hospital in the ROGA and National Instruction compilation of official documentation referencing the crowd management incident, neither the plaintiff's own unique experience of the impact of the injuries to her.

[26] So as to respect her dignity rather than showing her wounds in court which were under the plaintiff's stockings and dress, counsel for the parties agreed that photographs be discreetly taken and produced in court as a record thereof.

each lower leg with dried blood depicted on her legs and feet in the forefront of the photograph.

[40] She clarified, as she needed to since the ambulance personnel had registered her by a different *moniker*, that she had gone by the name of Macy Richards before her marriage which is the name endorsed on the ambulance records pertaining to her removal from the scene and treatment of her by the paramedics called to attend to her injuries.

[41] She admitted under cross examination that there had been protest action in Bathurst that day that had commenced around 17 January 2019 already. She denied, however, that she was in any way involved in these gatherings. She would not be drawn on the suggestion that the protests had intensified and become violent but could say at least that there certainly was "toyi-toying" going on.[27]

[42] She did not see that any of the protestors were armed.

[43] Although she was upset by what had happened to her she explained that she had declined when invited by one Warrant Officer Abrahams after the incident to make a formal complaint to the South African Police Services regarding the shooting because she did not trust speaking to a police officer. In describing her emotions in this respect, she related that *"I just entered fear and became totally wrong."* She assured the court that this had nothing to do with any concern on her part that it would otherwise show her up as having been associated with the protestors.

[27] The concept of "toyi-toying" seemed to have been bandied about in the trial as a euphemism for unlawful protest action which it is by no means *per se* is. See sections 8 (5) and (6) of the ROGA concerning the unique circumstances where the singing may tend toward criminal conduct.

[44] Although she had been told that there were cartridge shells left behind at the scene after she had been shot in the Zweni homestead she also refuted that the failure of these to have turned up for ballistic testing by the police at their request was in any way sinister on her part.[28]

The evidence of Ms. Zweni:

[45] Ms. Bulelwa Zweni testified that she was at her home on the afternoon in question. From her veranda where she sat, she could observe the toyi-toying of the protestors going on to her right. The plaintiff arrived from the opposite side at about just after 4:30 pm, uninjured. She invited her in after realizing that she had been affected by tear gas from outside and because, so she clarified under cross examination, the plaintiff had told her that she was avoiding the protesting crowd. They went into the room. She quickly went to the kitchen to get water for the plaintiff which the latter used to wash her face.

[46] Shortly afterwards a crowd of protestors ran into her home through the front door that she had not locked. They locked the door from the inside. The police, who were in official uniforms one would normally associate with police service members, arrived, and kicked the front door open.

[28] The parties entered into evidence by agreement a series of correspondence between their representatives concerning the possible obtaining of the shells supposedly recovered by agents for the plaintiff at the scene (depicted in the photographs in Exhibit A) for ballistic testing. The State Attorney asked that these be made available but the response elicited is that the "bullet" was not in the plaintiff's attorney's possession and later that despite "thorough investigation" from her attorneys' side, the cartridge cases could not be found.

[47] They came to the room where the two of them were seated and ordered them out from the room. They were carrying "big" firearms and ones on their hips. She and the plaintiff were instructed to bend down. She went out of the room leaving the plaintiff behind. She then heard shots being fired. She looked back and noticed by looking at one of the plaintiff's legs that was within her limited line of sight that the plaintiff was bleeding below her knees.

[48] There was a disturbance inside while people were removed from the back room and pushed to the front, during which time she too was shot, she could not say by whom as there were many police officers and she did not look at them. According to her no persons inside her home other than the police were armed. The bullet that struck her entered her hip from the front through to her groin.

[49] After having been shot, she was instructed to kneel and put her hands above her head. They were taken out of the house through the gate and put in in a police van. From there they proceeded to the Port Alfred police cells where she was detained in a cell for three days. Later she was moved to East London where she was held in police custody for another four days.

[50] She believed that the reason for her being taken to East London related to the fact that on 17 January 2019 there had also been a "toyi-toyi" in Bathurst whereupon she had been warned not to be among the people who were striking or toyi-toying.[29]

[29] Her evidence in this respect was vague. She may have been warned under the provisions of the ROGA, or perhaps there was an interdict in place. It was however not taken further because, so I assume, the focus was on the plaintiff's claim.

[51] She concluded with the remark that on the day of the shooting she had been consciously resisting any involvement in the present service delivery protest action because of an earlier warning to her not to again be a part of this.

[52] Thus, she openly acknowledged under cross examination that around 4pm that afternoon, the protest action that had commenced on 17 January 2019 already, was still ongoing. She was, however, not inclined to agree that the protestors were violent, neither could she be drawn on what their actions entailed. She explained that a school situated in front of her house in any event obscured her vision of the protestors and what they were getting up to. She was unaware of any smoke or fire, neither could she hear people singing and chanting or observe anyone throwing stones or petrol bombs at the police as was suggested to her through cross examination. To the contrary, she was quite firm that her business was in her own home and that she was in no way part of the protest actions or in any way involved.

[53] She conceded however that around 4pm the protestors had moved uphill coming closer towards Meman Street at Four Ways (in close proximity to her house) and that the police were following them. She refuted that she saw that any of them carried stones or weapons. She had noticed contemporaneously with the plaintiff's approach that some of the protestors were running. When they came up closer to her homestead, she was still seated on the veranda but swiftly moved indoors together with the plaintiff.

[54] She agreed that she had not seen with her own eyes how the police had gained entry or anything else that had happened behind the closed doors of her bedroom where she sat with the plaintiff, although she could discern as much by hearing.

[55] She was not observant as to who came inside her house but once she reached the police cells, she learnt that 36 people had been arrested at her home.

[56] She estimated that she had heard roughly 10 shots being fired in her home that day. She agreed that all of the shots that rang out were fired low down and that no one was hit on their upper bodies.

The evidence of Ms. Gaga:

[57] Thembakazi Gaga a 33-year-old resident of Bathurst testified that on 29 January 2019, after 4pm, she had come from her sister's whose husband had died when she noticed a crowd of people about. She stood and watched. In relation to the Zweni homestead, which was not known to her at the time as belonging to Ms. Zweni, she was standing three houses away. Police arrived from in front and behind. They were wearing uniforms and bulletproof vests. Shots were fired. She ran through an open gate into the Zweni homestead followed by police and other people in a crowd numbering less than 20 people.

[58] Windows were broken and the front door was kicked open by the police who were carrying shotguns and pistols on their hips. They were beaten by these uniformed police officers who were wearing the standard navy-blue uniform with bullet proof vests carrying shotguns. They insulted them by saying that they were fed up with these "bitches" and wanted to go home. Shots were fired. They were instructed to frog-jump out of the house. While she and others were making their way towards the door in this manner she was shot in the buttocks and on her ankle.

[59] She could not take the pain, climbed over others, and went out towards the front of the house. There she was held by a police officer who kicked her underneath. He pulled her back inside. The police wanted to count how many they were. Subsequently they were put in police vans but because it appeared that she was bleeding she was brought back into the house.

[60] Inside she noticed "Mother Dyibishe" (the plaintiff) who the police were trying to rouse by lighting her eyes with a torch. She could observe that the plaintiff's pupils were small. She also saw blood coming from her legs. Other police officers came in wearing jeans and T-shirts. She could identify them as police officers because she had encountered them before at the Beavers restaurant in Port Alfred where she worked. One of them was known to her as Debbie Hilbert.

[61] Debbie Hilpert asked her if she knew the plaintiff who she identified to her by the name Macy Richards. The plaintiff was a friend of her aunts who called her by this name.

[62] She was also asked to establish the plaintiff's age, which she put at 50. She was additionally asked if she knew what medication the plaintiff was on and informed Ms. Hilpert that she suffered from high blood pressure. She could not say what the plaintiff's address was. One of the plain clothed police officers rang for an ambulance. A mortuary van arrived on the scene first and then an ambulance vehicle.

[63] They were all supposed to be removed from the scene in one vehicle but the plaintiff's situation was assessed as an emergency and so she was taken away alone. Another ambulance arrived for her shortly afterwards and she, together with others, was transported to hospital where she was treated for her injuries and discharged.

[64] The vans at the scene were clearly inscribed with the appellation “Police”.

[65] She pointed out a scar among two others just above her ankle to indicate where she personally had been injured. The scar was described by counsel observing it more closely as being circular in shape.

[66] Under cross examination she agreed that she had seen the plaintiff earlier that day whilst watching the protestors around 4:30pm although she could not pinpoint where exactly.

The testimony of Ms. Draai:

[67] Ms. Ntombovuyo Draai also placed herself on the scene. She testified that she happened to find herself between the Zweni homestead and a neighbour’s house from which she watched uniformed police arrive at the scene and enter her house in pursuit of protestors. She claims that after they left, she entered the Zweni homestead and took photographs of blood she saw on the floor. She identified the photographs in Exhibit A as those she took on her cell phone which she had since lost.

The testimony of Mr. Richards:

[68] Mr. Ayanda Richards, the plaintiff’s nephew, was the last to testify. He confirmed for his part that he had contemporaneously photographed his aunt’s injuries at the Port Alfred Hospital the same evening of her admission.

[69] He also related that he had been given photographs sent on WhatsApp from Ms. Draai which he understood had been taken at the scene where the plaintiff was shot on 29 January 2019.

The plaintiff's admitted bundle:

[70] The plaintiff's bundle of documents, which was admitted into evidence without formal proof,[30] comprised of medical records of the Port Alfred Hospital pertaining to her treatment at the hospital upon her admission on 29 January 2019 and following. At face value they record her arrival at the hospital on that day at 18h35, the observation that she had suffered gunshot wounds to both her legs. Also, consistent with her testimony, they record that on 2 April 2019 the hospital performed surgery to extract foreign objects from her left leg.

[71] One of the admission records notes as follows: "*brought in by EMS crew. Patient was in the toy-toy at Bathurst then got shot on both lower legs. Left leg – entry and no exit point noted. RT leg entry. No exit. Fully conscious on arrival but does not want to talk."*[31]

[72] In the doctor's clinical notes of 29 January 2019 at 18h45 it is further noted as follows:

> "50 year old female apparently shot by police with rubber bullets in her home, thought to be part of toy-toy in Bathurst."

[30] Exhibit "A".

[31] One of the main thrusts of the defendant's defence was that the plaintiff was steeped in the protest action and that this observation, together with the next record (in paragraph 72) provided corroboration of that so to speak. It was also suggested that the last note showed her up to be an untrustworthy witness because it gives the impression that she told someone that she was shot in her own home after having placed herself in the Zweni homestead at the time. The plaintiff denied either assertion. Despite the promise of the testimony of the ambulance personnel to come that she was the source of the information and was very much conscious at the time (contrary to other medical records and oral evidence) they were not called to testify.

[73] The bundle also comprised of the photographs taken at the Zweni homestead by Ms. Draai, of the supposed discharged cartridges observed after the shooting.[32]

The defendant's case:

[74] Captain Ntloko attached to the Public Order Policing unit in east London was the only witness to give oral testimony on behalf of the defendant. In January 2019 he was the operating commander of the POPU.

[75] On the day in question and at the time of the plaintiff's claimed shooting he was the operational commander responsible for the operational execution and coordination of the tactical plan referred to the defendant's amended plea and who deployed a platoon of six police members to Bathurst under the watch of Warrant Officer Bishop earlier that day. He also dispatched sergeants Bakumeni and Mageda together with the platoon, who were responsible for the video component. The initial base was later strengthened by ten further POPU members who were added when the initial offensive measures employed under the command of Warrant Officer Bishop earlier in the day were perceived to be unsuccessful in stabilizing the crowd scene and restoring public order.

[76] He alluded to what had been set forth in the tactical plan to manage the crowd on the R67 Bathurst, which plan was included in the police bundle.[33] The stated objective at the outset of the exercise, which is the standard of the ROGA and National Instruction, was to manage the crowd *"in a professional manner that*

[32] As stated elsewhere it was unnecessary to follow the ballistic theme contended for.
[33] See Exhibit D at pages 11-12.

ensures that Public Order is maintained by: Establishing uncompromising security measures: Limiting the probability of critical incident occurring. Limiting the impact of any critical incident through intervention."

[77] The use of force policy required to be adhered to in respect of the plan, consistent with what is outlined in the National Instruction, was stated thus:

> "Members should display the utmost tolerance towards the participants.
> All members must apply the principles of minimum force, application of progressive levels of force and no individual action unless in self-defence or private defence.
> Force used, must be appropriate and immediately cease as soon as the threat ceases.
> 40 millimetre Launchers with CS, shotguns with rubber rounds (should be available but kept out of sight)
> No shotguns (rubber bullets) or CS (teargas) must be used without instruction from the Platoon Commander/Section Leader.
> Pepper spray should be used for arrest purposes and not for crowd management."

[78] The stipulated arrest policy, as provided for in the ROGA, was that these were to be managed through the local Bathurst police station. The ultimate "Operational order/Execution" with reference to section 1 under Warrant Officer Bishop with 8 members entailed "negotiate, pushback and arrest" and section 2 under Sergeant Matyeni involved both "pushback" and "arrest", all resorting within the concept of "offensive measures".[34]

[79] Although Warrant Officer Bishop did not testify, the official recording of the events from early that morning reflect the concern that the POPU had for escalating violence. (Notwithstanding the objection by plaintiff's counsel that the matter-of-fact noting of the events should not stand in the place of actual evidence of these accounts, it can in my view safely be deduced from the tenor of the SITREP that an

[34] See definition outlined in footnote 12 above.

obligation arose for the POPU to take charge of the scene and bring their specialization to the fore to restore public order.)[35]

[80] He testified that when he arrived on at the scene on 29 January 2019 at 17h10, there were approximately 500 people rioting. The road was blocked in the direction of Grahamstown towards port Alfred and there were stones being thrown at motor vehicles. Tyres were also burning.

[81] He took over as commander. By this point the riots were concentrated between the rail line at a place known as Four Ways. He described the situation as chaotic. The protestors were singing. They carried shields fashioned from zinc. Some were armed with slings, and some started throwing stones at the police. He and other members of POPU made a formation in a half circle. He used stun grenades and threw them up in the air as the rioters were approximately 15 footsteps away from them. The crowd scattered momentarily but came together again. Participants threw stones and purported to "overpower" them by "putting a crowd around them" and approaching forcefully. There were by then approximately 550 rioters. He feared that those approaching would injure the police. He thus ordered the POPU members with him, as a last resort, to shoot 5 rounds at the feet of the participants. He then instructed that the protestors should be arrested.

[82] Subsequent to the shots being fired the protestors scattered which he considered a successful application of the dispersal manoeuvre. Some of them ran into the bushes and others entered into nearby houses and were "caught".

[35] The official nature of the operation can hardly be gainsaid.

[83] They then reopened the road on his instructions.

[84] He was not at the scene for more than 15 minutes.

[85] He explained that he had ordered the police to shoot at the feet of the protestors because it does not cause serious bodily harm but would at least cause them to run away, which in this case had such an effect. He acknowledged that in his vast experience of crowd management some participants might be injured by falling on the ground in the running away whereas "some will get injuries and (be) caught." He clarified though that even with the last resort type of offensive measure adopted such as he had in all the circumstances, injuries sustained by participants would usually be in the nature of bruising to the feet from the rubber bullets whilst others might incur scratches because of their falling on the ground.

[86] In response to the question whether it was possible that they plaintiff could have been shot in a house in Bathurst as she had testified, he clarified that his instructions to the members to shoot was expected to happen in an open, outside space.

[87] He clarified that the rubber bullets utilized by the POPU (also called residuals) that would have been discharged by shotguns under his command are white in colour.

[88] He did not have any knowledge of the plaintiff.

[89] He claimed rather surprisingly (since the official IRIS records indicate the contrary) not to have been aware of any ambulances dispatched to the scene. Later

under cross examination he clarified that he meant that at the time he was on the scene he had not been aware of an ambulance and, to prove that he was not avoiding the question, offered the explanation that had he been aware of it at the time, he would certainly have embraced the knowledge of an injury. Indeed, as he rationalized:

> "If I did see an ambulance on that day in question, M'Lady, I should have mentioned it by saying, I did see it. As a commander I must be part of everything and go and see. If there is an ambulance I must be also a part there and see what is happening there, at the ambulance, as a commander. More especially, M'Lady, a person is being injured."

[90] He accepted however, with reference to relevant entries in the IRIS, that the dispatch of an ambulance was recorded in the narrative of what had happened that day.

[91] He acknowledged that the arrests of participants that afternoon numbered around 56 but he had no personal knowledge or experience of these. (As an aside no record was produced during the trial to indicate who was arrested at the scene, where exactly the suggested suspects were arrested or who the relevant peace officers were who carried out this aspect of the tactical operation, although one would certainly expect such information to be necessarily reported in relation to a crowd incident.)[36]

[92] Under cross examination he confirmed that the members under his command had been clothed in uniform or field dress and that they were armed with both shotguns and side pistols. The also wore body armour and helmets. The members of the police from Bathurst numbering more than 10 were identifiable by uniform as well. He confirmed with reference to video footage what apparel and insignia was

[36] One would also have expected such a focus in the defendant's case given his reliance on the provisions of section 49 of the CPA.

common among the members present on the scene and how the POPU members could be distinguished from the normal members.

[93] He clarified that the POPU does not use the blue shotguns shells containing rubber bullets. (He acknowledged with regard to the picture shown to him purportedly taken at the Zweni homestead after the shooting, showing examples of such shells that these were those.) However, he claimed to have no knowledge of what ammunition was in use by the "normal police."

[94] He confirmed that he did not enter into any of the houses in Bathurst that afternoon, and also had no knowledge of any blue shotgun shells found inside the Zweni homestead. He also claimed to have had no knowledge of the plaintiff supposedly being shot in a house, only having heard about it for the first time in court.

[95] He conceded that despite what had been pleaded on the defendant's behalf the IRIS records to the contrary reflected that live ammunition had been utilized at the crowd scene that day. Although he distanced his own team members from having done so he was constrained to concede under cross examination, when shown a video of the earlier dispersal operation that day that a POPU member is visibly seen carrying a R5 rifle in his hands which is capable of firing live ammunition only. He seemed to equivocate at first in this respect but ultimately explained that he had misstated his first response under cross examination to the question whether the police had used live ammunition that day, which was to the following effect: *"If we are referring to public order police, my answer is, yes."*

[96] He explained though that he had heard the question wrong:

> "You said, I hear you correctly, you said the police, that is the South African Police and then I talked about POPS and you asked if they ever used live ammunition. I said, yes. I said, yes, but POPS used the rubber ones. When I am reading this bundle in front of you,[37] there is a police which used live ammunition. In this bundle they were not POPS members, M'Lady. That is how I answered the question to that."

[97] He conceded that what is stated in the amended plea by the police that no live rounds were discharged *on that day*, was factually incorrect.[38]

[98] According to his own assessment of the threat at the time he took over command of the crowd scene, he was satisfied that the police were dealing with an "unrest situation" which, regarded on the National Instruction's scale of threats, he put between levels 2 and 3. (Level 1 according to the scale poses a peaceful gathering scenario where there is no threat, or where no need for the use of force is envisaged. Level 2 presupposes a scenario where there is "unconfirmed information regarding a possibility of a threat against lives and property." Level 3 is reached when there is confirmed information regarding a likely threat to lives and property. In this respect the POPU is required to take operational command although visible policing at station level and the Metro Police service may be utilised to assist in policing the event.)[39]

[99] He clarified that regardless of who among the team were "normal members" that he would have assumed overall command and that he would have taken over "everything" but this seems to have concerned only his dispersal manoeuvre. According to him the "normal police" were there but only to make an arrest of the people running. In his estimate, which is quite bizarre given his accepted

[37] This is a reference to the police bundle, exhibit D.
[38] Mr Olivier prevailed upon this court to find that this supported the probability that live ammunition was used but it is unnecessary in my view to make such a definitive finding.
[39] The different levels of threat are outlined in paragraph 9(3) of the National Instruction.

responsibility under ROGA to take operational command in level 3 incidents in order to stabilise the situation, he asserted that they (the "normal police") were not part of the crowd management situation most especially the dispersal manoeuvre.[40]

[100] Thus asked at what point the SAPS members would have assumed any role at all he clarified that they were on "the sides" when people were running away and their obligation was to catch or arrest the ones nearby at least as opposed to those who might manage to run away. There were at least more than ten such members who he suggested were (again strangely given his overall responsibility for the operation under the auspices of the ROGA and the tactical plan agreed upon which extended to possible arrests) not under his command or control.[41]

[101] As for matters under his control, despite the national Instruction requiring him before a resort to the use of offensive measure involving force to have warned the protestors he conceded that he did not. The reason indicated why that is so is because *"in the manner in which they were … there was violence. They did not give us a chance to do that."*

[102] As for the suggestion put to him that the defendant's justification seemed to rest on the premise that the plaintiff was first shot in the crowd outside and then ran inside the Zweni homestead he discounted such a possibility on the basis that if it

[40] Paragraph 10 (3) of the National Instruction, which assumes the appointment of an overall commander designated by the provincial commissioner or the divisional commissioner: ORS in level 3 incidents as provided for in sub-paragraph 10 (2), is in "overall command" of the specific operation for which he is designated and is responsible for *all* actions taken, and for all persons and resources deployed to manage that particular operation. In terms of paragraph 13(1) (d) the operational commander *remains in command* of the operation and takes all tactical and operational decisions.

[41] Paragraph 13 (1) (f) of the National Instruction does suggest that a member of any other agency, discipline, unit or station may not be permitted to perform duties in the same section, platoon, company, or group with POP members (unless the officers have trained with the POP members and are able to function together with them as a cohesive unit).

had happened like that he would have taken responsibility for the plaintiff as an injured party.

[103] He initially conceded that he had understated in his evidence in chief how many stun grenades and rocket flares he had discharged, but then qualified that some of these had been discharged earlier in the course of carrying out the operation. He confirmed however that only one stun grenade and rocket flare was thrown by him at the scene of the dispersal manoeuvre he ordered.

The defendant's admitted documentation:

[104] The parties agreed that the official videographer on the scene, Sergeant Bakumeni, be excused from giving oral testimony. An affidavit deposed to by him was admitted into evidence in which he essentially confirms that he recorded what is on the disc that was entered into evidence, that it was taken by him, downloaded from his camera to make the working copy exhibited in court, and that it represented a true visual of the events of that day without edit or tampering. He explained however that there was no video recording of the incident closer to 5pm that day. This was unfortunately because both his main and back up batteries had died. He had left his own charger behind and could not be assisted at the station to charge them. Therefore, at the time the arrests occurred he was at the station and missed capturing this important event at the scene.[42]

[105] It is unnecessary in my view to explain in detail what is on the disc entered into evidence neither did counsel provide a common description. I have elsewhere alluded to the fact that it certainly supports a basis for the POPU to have been

[42] This is ironically the most significant moment concerning which the defendant was to give an account for.

dispatched to the scene, but in the absence of any footage at the vital time of the alleged shooting of the plaintiff, there is no official account of the arrests of any offenders at the crowd scene.

[106] It is necessary, finally, to traverse the documentation introduced by the defendant into evidence marked Exhibit D.

[107] In the first instance a docket appears to have been opened, and a complaint initiated, by Warrant Officer Abrahams stationed at the Bathurst police station on 7 February 2020 of an attempted murder alleged to have been committed on "2019/01/30 at 14h00"[43] at Kalikeni Street, Bathurst. On the clear face of it this docket relates to the shooting of the plaintiff. The description of offence is described on the docket cover as "possibly allegedly shot by rubber bullets" and is supported by the A1 statement of Warrant officer Abrahams in which he describes steps taken by him in the course of investigating the alleged shooting incident where "a lady" was "allegedly shot". He avers that he was instructed by cluster commander Brigadier Govender to follow up.[44] The victim who is the subject of the investigation is reported to have suffered "possible gunshot wounds on both limbs" and is stated to still be in the hospital at the time of making his statement. He confirms as the plaintiff also stated in her testimony that the victim does not wish to discuss the matter or open a case. He further relates his discussion with a doctor concerning her condition (and her message via him that she does not wish to open a case) and the latter's confirmation of the need for further surgery to remove a "possible projectile" from her limbs.

[43] This date is wrong, but nothing turns on the mistake. It is ultimately common cause that the injury was sustained at the scene on 29 January 2019.
[44] This appears to be in keeping with paragraph 18 of the National Instruction that requires dockets to be opened where force has been used to disperse crowds.

[108] The investigating diary further reflects his attempts (also referenced by the plaintiff in her testimony) to have persuaded her to make a statement but to no avail. He also clarifies in the diary that he was instructed to open the case on behalf of the plaintiff with the docket to be transferred to IPID for further investigation as it is a "police unknown docket."[45]

[109] The next document is the Public Order Policing Tactical Plan which I have referred to above in my summary of Captain Ntloko's testimony regarding how the crowd scene was intended to be managed.

[110] This is followed by a typed series of IRIS "Explanation for an Incident (that has taken place)" occurrence book entries generated by the POPU (WO JS Olivier) concerning the incident which is categorised eventuality wise as "Crowd (unrest)" with reference to: "± 500 People at Bathurst Barricaded R67 Route with Stones on 29 January 2021" at 08:00. It focuses on early events of the day commencing at 10h00. It reflects equipment used by the POPU members on the scene under the command of Warrant Officer Bishop, evidently to push protestors back to the "location" from the R67 Road, reported to have been managed with success although a threat remained in that the protestors were wanting "to come back on the road." The next focus is on what happened higher up at the railway line (still earlier in the day). Two assaults on POPU members are noted, one reported to have been taken to hospital for medical attention. There is a focus on activity back on the national road at 15h15. It is again recorded that the POPU members pushed protestors back to the location "using pyro tech and rubber". It records the arrest of two persons at

[45] Paragraph 18 (2) of the National Instruction requires that the Independent Police Investigative Directorate ("IPID") must be notified in cases where force has been used to disperse crowds.

the same time on charges of public violence. (Notably there is no detail concerning the events and command of the scene by Captain Ntloko around 17h00 save his report that 36 suspects were arrested; that "the situation is still tense" and that his members are patrolling the area.)

[111] A fuller narrative of events happening at the crowd gathering environment is provided in the context of "SITREP" entries in the joint operation centre ("JOC") occurrence book.[46] It is thorough in its detail and suffice it to say that in its telling paints a picture of escalating threats to public order. Its speaks of the need for intervention by POPU and the arrival on the scene initially of only six members (plus two video operators) to assist, their failure to persuade the protestors to listen and the action taken through a dispersal manoeuvre earlier in the day to clear the road. This is noted to be momentarily successful in the sense that the road is opened but the situation inside the township remains tense with fires being started warranting the need to send a fire engine. The need for backup from other stations is noted and increased manpower in the form of ten more POPU members, both of which components are later provided. Threats concern the size of the crowd growing and moving from the perimeter of the bush where they can't be seen. Stones are being thrown at motor vehicles on the road. New fires are started along the railway line and obstructions are placed in different parts of the road. Two petrol bombs are thrown at the police contingent although one does not explode. It is at this point (at 12h19) that Warrant Officer Abrahams is reported to have fired three live rounds in the ground. Later it is noted that two police officers are injured, one requiring attention at the hospital. A telephone threat to members living in the community that they are going to be killed is phoned in to the police station. Two complaints of

[46] "JOC" in terms of the National Instruction means the joint operation centre that is activated at the scene of an incident or event.

damage caused to motor vehicles by stones thrown at them on the national road are noted in the space of twenty minutes.

[112] The next significant entry is at 17h00 when Sergeant Colonel Reddy informs the JOC that he needs a closed "bakkie" as arrests have been made.

[113] The following entry at 17h30 records the same officer reporting the need for an ambulance for one of the protestors who has a gunshot wound. At 17h45 it is again reported by him that approximately 25 people have been arrested and that two of the suspects are injured, one seriously and awaiting an ambulance. This "suspect" is transported to P.A (probably a reference to the Port Alfred hospital).[47] At 17h46 it is stated that the ambulance arrived and that Captain Slabbert escorted it into the township to the injured people. The final arrest count noted at 19h41 is of 29 women and 5 men.

[114] Even though an entry at 20h30 records that POPU members are still patrolling the area, there is really nothing much written about their input at the critical time before the shooting.

[115] On Friday 1 February 2021 at noon it is reported that the "JOC" is closed by reason that there is no protest nor blockages taking place in Bathurst and that "all is normal so far."

[116] The next document is the local occurrence book of the Bathurst police station which contains some SITREP entries notably regarding the closure of the R67 road (and others in consequence) from early morning and that the protestors are making fire with tyres and branches, the arrival of POPU members led by Warrant Officer

[47] If this suspect was intended to be a reference to the plaintiff this was not clarified in evidence.

Bishop, the early morning dispersal, the dispatch of a fire-engine, the need (at 09h40) for back up from other stations as the crowd is throwing stones and bottles at the police, at 12h55 the concern noted that "the situation is getting worse" and that community members are throwing petrol bombs at police members, and the noting of injuries to POPS members. At 13h26 there is a called in threat from an anonymous male person to the station that the captain must go and collect the uniforms of all police members who live in Bathurst because they "are going to die"; and at 16h30 the report of a complainant is noted that her vehicle has been stoned on the R67.

[117] The Occurrence book register of the POPU in East London itself carries the incident report of Warrant Officer Bishop of the failed attempt in the morning to negotiate with the crowd on the R67 culminating in his dispersal manoeuvre. It records the needs for a further dispersal manoeuvre at 12h00 because participants are reported to be throwing stones with the intent of coming back on the road. It notes that no arrests have been made up to that point. A report 15 minutes later records that the participants have moved up to the railway line where they are making fires. Thirty minutes later Warrant Officer Bishop asks for a Nyala. Next there is an injury on duty recordal of the two POPU members having sustained injuries from a sling shot and a stone thrown respectively. At 16h31 there is a report of two arrests made in Bathurst for the offence of public violence.

[118] Significant for present purposes is Captain Ntloko's own report from takeover from Warrant Officer Bishop (which supports the premise that the team deployed under the latter's command had not had the desired result and that more support was needed) made only later that evening at 23h15 as follows:

> "On my arrival at about 17 H 10 the road was blocked, and they throw stones to the side of the police has the result the police were so difficult to control the situation I instructed the police to disperse and arrest the perpetrators 36 people were arrested and some of the members used some ammunition."

[119] He then details all the ammunition used by each member which accords with the other records in this respect.

[120] Significantly he notes that no injuries pertained owing to his dispersal manoeuvre.

[121] These records are followed by an isolated Bathurst OB extract in which Warrant Officer Abrahams (consistent with what is in the docket described above) has made his own report on 4 Feb 2021 as follows:

> "I get instructions from Brigadier Govender to follow up on a allegedly shooting incident happened on the 30/01/2019 in Bathurst area. I proceed to hospital to make enquiries on my arrival at the hospital I went to the ward and met with Sister Whitebooi who received the patient Nomsa Dyibishe (Richards) of … Bathurst. I informed Sister Whitebooi and she informed me that they received the patient with allegedly gunshot wounds (rubber) on both legs with a right fracture fibular and the patient will be discharged on 2019/02/04. So the bullets does not have a exit it is still inside the patient lower limb And it will be discharged only on 2019/02/18. The patient will be discharged with a back ... Then I spoke to her doctor Dr Sauli … and he informed me that he discussed with his patient, that she must not open a case now. She must heal first, so they will take a decision after the 18/02/2019, when he examined her again, I also inform the doctor that the police can open a skeleton docket on behalf of the victim and he informed him that he discussed with his patient and they agree to wait until she is heal. I even asked Sister whitebooi to go and find out if the victim wanted to speak with me to interview her and she informed Sister Whitebooi that she discussed with her doctor that she will open a case or speak with police when she is heal, and the doctor informed me after he remove the bullet he want to hand over to the investigating officer for the chain of custody. I left my number at Sister Whitebooi at Port Alfred hospital to give my number to the Doctor if there is anything they need from SAPS. So they don't want any cases to be open at this stage. And also the nurse Sister Whitebooi that the entrance look like big bullets." (Sic)

[122] The next document in this series is the patient report form of the province of Eastern Cape Ambulance Service which reflects on the face of it that Macy Richards was attended to on 29 January 2019 on location "at Bathurst SAPS". The mobile report is said to have come in at 17h26. They record being present on the scene at 17h48. The scene is departed from to the hospital at 18h14 and they arrive at the hospital at 18h30. The history or mechanism of injury recorded on the patient form is "gunshot" with the chief complaint "*had been shot with a gun into both legs by a police."*

[123] The next document reflecting the handover at the Netcare Emergency Department is the patient treatment form in respect of the plaintiff with time of arrival triaged and to bed reflected as being at 18h35. The indication under the heading "Trauma" is of an injury on 29 January 2019 of gunshot. Under signs and symptoms it is endorsed on the records that "*Brought in by EMS crew. Patient was in the Toy-Toy at Bathurst then got shot on both lower legs. Left leg- entry and no exit point noted. Rt leg entry. No exit. Fully conscious on arrival but doesn't want to talk.*"

Discussion:

[124] The first question for determination is whether the plaintiff was injured.

[125] There is in my view a host of objective evidence that supports the probable conclusion that the plaintiff was at least injured contemporaneously with the operation of the POPU's tactical plan in the late afternoon of 29 January 2019 and that the SAPS acknowledged the injury firstly by facilitating the entry into the township under the control of POPU of an ambulance to deal with her gunshot

injuries and her emergency dispatch to the Port Alfred Hospital to be treated. The injury is also noted and followed up by Warrant Officer Abrahams according to National Instruction protocol after the fact.

[126] The entries in the admitted hospital records support the plaintiff's testimony that she was struck on both legs. The unsolicited investigation (at least from her perspective) after the shooting as a protocol measure adopted in a situation where force had been used, is also consistent with a recognition by the defendant of an injury arising in the course of the operation that was necessary to be followed up on and further supports the plaintiff's testimony that a procedure after the fact to extract a foreign object in her leg was carried out. This too confirms that the injury was in the nature of a gunshot wound.

[127] As stated earlier it is not fatal to the plaintiff's claim that no ballistic evidence was adduced to confirm definitively that what was extracted from the plaintiff's leg in the follow up procedure constituted remains of cartridges ordinarily fired by a police weapon.

[128] Neither does it matter in my view whether the cartridges purportedly seen after the shooting were white or blue because the defendant would be vicariously responsible in principle to account for all gunshot injuries caused to a person during the course of a ROGA operation whichever enforcement agent may have discharged them.

[129] It was never suggested that the plaintiff was shot by a firearm from a rogue source. The suggestion put to her under cross examination that she may have been shot by a metro police officer also cannot be sustained as all persons discharging firearms during the course of the operation and under the command of Captain

Ntloko were accounted for by him as either ordinary SAPS or POPU members. If any metro police were involved this would in all probability have been reflected in the official IRIS entries.

[130] The next question is whether the plaintiff was shot inside the Zweni homestead.

[131] The premise for the defendant's case that the plaintiff must have been up to no good and probably got shot during the dispersal manoeuvre consistent with the command having been given by Captain Ntloko to shoot at the feet of the protestors is not supported by his testimony. In fact he emphatically discounted the possibility. Nor is it reflected in any of the official IRIS entries that persons were injured outside when he issued the command to shoot in the course of dispersing the crowd.

[132] What is of course missing from his account is what happened "on the sides" as he put it, when the protestors ran away and how they were arrested by the normal police officers who were tasked with such a function by the tactical plan. The "normal members" simply offered no evidence to fill in the gap.

[133] There is no reason to reject the plaintiff, Ms. Zweni or Ms. Gaga's evidence that the plaintiff was injured inside the Zweni homestead which was not gainsaid for example by the ambulance personnel who transported her away from that address. Also no evidence was led to counter the testimony of Ms. Zweni or Gaga as to where they were arrested. This information is simply absence from any official police records.

[134] In any event it is more plausible as was the cohesive contraction of all the accounts given on behalf of the plaintiff that the crowd and the police converged on

Ms. Zweni's homestead. Captain Ntloko also testified to the running into houses by the crowd after the dispersal manoeuvre and it is common cause that her homestead is in close proximity to where Captain Ntloko was when he gave the command to shoot.

[135] Even assuming that the plaintiff was shot in the course of the dispersal manoeuvre authorised by Captain Ntloko, the defendant has failed to make out a case for justification on the basis envisaged in terms of section 9 (2) of the ROGA. Instead the pertinent defence of the defendant implicates the exercise by the SAPS of an arrest yet there was an absence of any testimony by the defendant, who in my view bares the onus in this respect despite his bare denial, to justify the plaintiff's injury having been sustained on such a basis.

[136] The emphasis of the cross examination of the plaintiff's witnesses throughout purported to present her, not as constituting a threat in her own right, but as being part of a menacing troublesome crowd/gathering of nameless and unidentified protestors whom she supposedly associated herself with. Even such a premise is entirely enigmatic. Indeed, even if she associated herself with the cause, this would not *per se* have put her on the wrong side of the law. More was required form the defendant to develop his case along the lines of the purported justification for the harm suffered by the plaintiff during the exercise of the tactical operation.

[137] In order to justify the application of deadly force in terms of section 49 of the CPA, the defendant needs to have established the requirements set forth in the section. For one, it must be established as a fact that the plaintiff was being arrested or fleeing from an arrest. No such evidence was presented. Instead the court was asked to draw an inference to such effect. Given Captain Ntloko's disavowal that

the plaintiff was injured flowing from his final dispersal manoeuvre such a request is untenable and is not borne out by the evidence. Instead the officers who purported to arrest the plaintiff should have tendered evidence to explain why they used "deadly force" in carrying out their ancillary part in the tactical plan that proscribes the use of force. It was certainly not within the contemplation of Captain Ntloko that force not authorised by him would be employed by non-specialised officers.

[138] In the result the defendant has failed to meet the onus on it to prove any justification for the shooting.

[139] Before concluding, I dismissed the defendant's application for absolution from the instance on 12 November 2021. I indicated that reasons would be furnished together with my merits judgment upon the conclusion of the matter. In dismissing the matter, I noted in summary that:

> "Applying the classic test whether at this stage there is evidence upon which a court might reasonably find for the plaintiff and having regard to the facts and evidence that this court should have regard to in making that consideration, I am satisfied that the evidence at least prima facie establishes that the plaintiff was assaulted and that by members of the South African Police Service or, in respect of the plaintiff's alternative claim, that police members discharged (a) firearm(s) in her presence in circumstances where the pleaded conclusion of negligence may be drawn."

[140] I have indicated above the complex nature of the case and the not technically adequate form of pleading employed by the defendant even though the last minute amendment to his plea passed without demur from the plaintiff. Especially in the context of the peculiar provisions of the ROGA and the admitted documentation that the defendant intended to rely upon as providing the contextual background to the conceded discharge by the POPU members of ammunition in the course of the execution of the POPS/SAPS tactical plan whilst being in charge of the protest action

scene, I considered that there was enough of a reason to require an explanation from the defendant for the injury that had arisen.

[141] Not only did the documentary evidence offer an insight into how the injury might have happened, but the implied reliance of the provisions of ROGA introduces a unique situation of legal accountability in crowd gathering management situations under its provisions.[48]

Order:

[142] I issue the following order:

1. The defendant is held liable for such damages as are found to be proven arising upon her having been shot by the defendant's members at 1035 Memani Street, Bathurst, on 29 January 2019.
2. The defendant is liable for the costs of the hearing.

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B HARTLE

JUDGE OF THE HIGH COURT

[48] In *Carmichelle v Minister of Safety and Security* 2001 (4) SA 938 CC at 970 F – G the court noted that where factual situations are complex and the legal position uncertain, the interests of justice will better be served by the exercise that the trial judge has to refuse absolution. See also in this regard the approach adopted by the Supreme Court of Appeal in Nandi Jacobs v Minister of Justice & Correctional Services (431/2020) [2021] ZASCA 151 (27 October 2021).

DATE OF HEARING		14, 17-19 May 2021and 19 - 20 May 2022
DATE OF CLOSING SUBMISSIONS	:	27 October 2022
DATE OF JUDGMENT	:	5 October 2023

Appearances:

For the plaintiff : Mr. W Olivier instructed by McCallum Attorneys, Makhanda (ref. Mr. M McCallum

For the defendant : Ms. L Ntsepe instructed by The State Attorney, Gqeberha (ref. Ms. N Fudumele)