

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

DATE: 24/05/2007

CASE NO: 2000/2007

UNREPORTABLE

In the matter between:

HEILA OOSTHUIZEN

PLAINTIFF

vs.

**EZEKIEL SIBANYONI
NATIONAL EDUCATION HEALTH
AND ALLIED WORKERS UNION
(NEHAWU)**

FIRST DEFENDANT

SECOND DEFENDANT

JUDGMENT

SERITI, J:

In this matter, the plaintiff instituted a civil action against both defendants in terms of which the plaintiff claimed certain damages against both defendants.

According to the plaintiff's particulars of claim, on or about

7th August 1997 and at Department of Education in Pretoria the first defendant participated in a industrial action in furtherance of the objectives of the second defendant, alternatively on the instructions, alternatively on the special instance and request of the second defendant.

The plaintiff further alleges that in carrying out the objectives of the second defendant or on instructions or special request of the second defendant, the first defendant intentionally assaulted her or attempted to assault her or intimidated her by kicking at her or throwing her with a stapler or by abusing her verbally and as a result intimidated her.

At the relevant time, the first defendant was a member of the second defendant.

The plaintiff further alleges that the conduct of the first defendant as mentioned above took place in public or in the presence of the other members of the second defendant.

In their plea the defendants alleged that the first defendant, on the said date and place, participated in a lawful protected strike as defined in Section 52(2) which complied with the procedural and substantive requirements as set out in sections 64 and 65 of the Labour Relations Act of 1995.

The defendants, in their said plea denied that the first defendant was in any manner forced or persuaded or instructed to participate in the said industrial action.

The defendants further denied that the plaintiff was assaulted or intimidated by the first defendant in any manner whatsoever.

The first and second defendant filed a counterclaim. The said counterclaim was filed against the plaintiff in her personal capacity.

For ease of reference, I will refer to the parties as they are referred to in the particulars of claim.

Claim A.

In their claim, the defendants alleges that on or about 27 August 1997 at the Department of Education, 123 Schoeman Street Pretoria, the second defendant organised a national protected lawful strike in which the first defendant voluntarily participated.

During the process of the demonstration, the first defendant & 79 other members of the second defendant went to offices of different heads of departments and senior member's offices to deliver a memorandum containing their grievances. Other heads of departments and senior staff members accepted the memorandum without any difficulties but the plaintiff, when they arrive at her

office said to the first defendant and other members of the second defendant: “Gaan uit kaffirs, gaan uit met julle kaffirs Unie” and further assaulted the first defendant and members of the second defendant by spraying them with a spray gun containing a harmful substance which affected their health.

As a result of the above-mentioned wrongful and unlawful conduct of the plaintiff, the first defendant’s reputation and dignity were damaged and he has suffered damages in the amount of R250 000.00.

Claim B.

On the date, place and time mentioned in claim A, the plaintiff uttered the words mentioned in claim A and further assaulted the first Defendant and members of the Second Defendant by spraying them with a spray gun containing a harmful substance which affected their health. The words used by the plaintiff made the first defendant to feel humiliated and degraded and as a result thereof, the first defendant suffered damages in the amount of R250 000.00 as he felt insulted and humiliated and his dignity and reputation were impaired.

Claim C.

On a date, place and time mentioned in Claim A, plaintiff uttered words therein mentioned which words were defamatory to the second Defendant and as a result thereof, second defendant suffered damages in the amount of R500 000.00.

In her plea to the counter claim, the plaintiff pleaded that the

counterclaim has prescribed, alternatively, she pleaded that she denies that she uttered the word contained in the counter claim. She also denied that she was present at the Department of Education on 27 August 1992 as pleaded in the counterclaim. She also, in the pleadings denied that the industrial action in question was protected, and also denied that she had prior knowledge of the said industrial actions.

In the replication in respect of the plaintiff's plea in the counterclaim, the defendants alleges that they consulted for the first time with his legal representatives on 19 September 2000. This was the first time when they came to know about their rights to defamation and that they were entitled to file a counterclaim. Prescription runs from the time when defendants became aware of their rights.

Shortly before the start of the trial, the defendants launched an application in terms of Rule 33(4) of the Rules of Court. In the said application, the defendants requested the court to order that merits and quantum be separated.

The plaintiff opposed the application. In their answering papers and during argument, the plaintiff argued that they do not oppose the separation of merits and quantum but the court should make a qualified order in terms of Rule 33(4).

After hearing argument, the court granted an order in terms of prayer 1 of the defendants notice of motion. Costs were then

reserved to be decided upon at the end of the trial.

After the above-mentioned ruling, the plaintiff testified.

In her testimony, the plaintiff said that on 7 August 1997 she was at work at the Department of Education in Pretoria. She was employed in a senior position. She had a number of subordinates in her department. She was reporting to a director in her department.

She knew the first defendant from May 1996. The first defendant was also employed by the Department of Education although he did not work under her supervision.

She was aware of the planned industrial actions as she saw placards advertising the planned industrial actions two days earlier.

The relationship between the first defendant and second defendant and her was not good.

On the 26th June 1996 she addressed a memorandum to the Deputy Director in her division complaining inter alia about the work ethics of the first defendant. In the said memorandum she was complaining inter alia, about the fact that the first defendant was not observing the working hours and that he was also interfering with the messengers who were under her supervision.

On 21st September 1996 whilst giving instructions to the messengers, who were her subordinates in their office, the first defendant interfered and said to her get out of this office.

On the 21st July 1997 she addressed a memorandum to the Assistant Director, Deputy Director & Chief Director of certain divisions complaining about the behaviour, attitude and working ethics of the first defendant. She was also complaining about the fact that the first defendant was interfering with the messengers who are her subordinates.

The plaintiff further testified that on 17th June 1997 she became aware of an advert (letter) calling for a meeting issued by the second defendant. In the said notice of a meeting certain queries relating to other divisions in the Department were tabulated. Her division was also included as one of the divisions that the second defendant had problems with. She was afraid when she saw the said letter because it threatened her life.

There were other numerous difficulties that she experienced with the first defendant.

On 7th August 1997 she came to work early in the morning. At about 8h00 whilst in her office she heard a group of people singing, screaming, clapping hands and stamping their feet. At that time she gained the impression that the said group of people

were moving – they were not stationary.

Later, she heard noises of the singing group coming nearer her office. They were moving from office to office. The group passed her office and when they passed, she saw the first defendant in front of the group leading them. They went to another office on her floor. From there, they came to her office, and the first defendant was still walking in front of the group.

The first defendant was the first one to get into her office followed by other people. The first defendant looked aggressive.

In her office, there was a desk and in front of the said desk there were two chairs.

The first defendant climbed on top of the desk and the other people with whom he was also came into her office. They were singing, clapping hands and stamping their feet on the floor. The first defendant kicked files and documents which were on the table – whilst singing, they said inter alia, “one boer one bullet – let us get rid of white supervisors”. At that time, she was sitting on her chair and, the first defendant, whilst still on top of her desk, tried to kick her and she jerked backwards and as a result the first defendant did not succeed to kick her. She saw that the first

defendant was preparing to kick at her again, she took out her gas spray gun. She sprayed 3 times in the air and people who were in her office, ran outside and the first defendant remained behind, still standing on top of her table. The first defendant leaned forward and tried to clap her – she ducked and he hit her slightly on the left side of her neck. He jumped from the table (desk), grabbed a chair and threw it at her. She blocked the chair with her hand and the first defendant went out of the door. On his way out, the first defendant picked a stapler and threw her with same, which hit her on her leg. The first defendant verbally abused her, went out of the office and left.

She could not go out of her office as there were people singing and screaming on the passage outside her office. She was injured and shocked.

When it became quiet, some of her colleagues came to her office. Mr Benade also came to her office and she explained to him what happened. She was shocked and crying. A form relating to injury on duty was completed.

At some stage, they heard the crowd coming back to their floor and she, together with some of her colleagues, locked themselves in her office. At that moment, she heard people

talking at her door and she heard the first defendant saying “break door and kill”. She hanged outside the window and screamed for help.

The door of her office was opened and some of her colleagues came in. She was taken outside through the stairs of the parking lot. She was taken to a medical practitioner, Dr Venter, for treatment. She was later collected at the said consulting rooms by her husband. An appointment was made for her to see a psychologist on the same day.

Before going to see the psychologist she went to the police station to report her assault.

The following day, she did not go to work and ever since that day, she has never been to work.

She was hospitalised for some time and she was also treated by a psychiatrist.

The plaintiff further testified that during the incident in question she sustained scratches on the left side of her neck, bruised right arm and leg where stapler hit her. Her leg was bleeding and her right arm was also swollen. On the foot she had ligament injuries.

She further testified that she bought a “spray-gun” to protect

herself. She denied that she was given any memorandum by the protesters and she denied all allegations contained in the defendants counterclaim.

The plaintiff further testified that before the protest march in question there were other protest marches inside and outside their building.

Under cross-examination, she said that singing and dancing can shock you if you are not used to seeing same. Natural singing and dancing she can tolerate but it can shock her when people stamp their feet, sing, clap hands and scream.

She was afraid and scared of the protest march of 7th August 1997 because previous protest march led to people being injured.

In one disciplinary hearing where a member of the second defendant was involved, the first defendant was assisting the said worker and she was a witness. She later said that she had never interacted with the first defendant as a member of the second defendant. She further said that there was no records or complaints of misbehaviour by the protest marchers coming from other floors of their building.

When the first defendant and other protest marchers came into her office, she did not say anything.

The plaintiff was referred to a report prepared in terms of section 39 of Compensation for Occupational Injuries and Diseases Act 130/1993. The plaintiff testified that she was the source of information contained in the said report.

The said report is dated or signed on 7th August 1997 and it contains, full particulars of the employer, the employee (who is the plaintiff in the present case), the incident which caused the injury (which is described in the form as assault during protest march of NEHAWU members) and descriptions of the injuries. The injuries are described as injured right foot and shock.

No further injuries are recorded on the above-mentioned form.

The plaintiff was further referred to a report or letter written by Dr E.K Venter. In the said report, Dr Venter states that she examined the plaintiff on the day of the incident and she described injuries of the plaintiff as right forearm tender and swollen, swollen left ankle (ligament injury) and injured calf. It was pointed out to the plaintiff that this report makes no mention of injured right foot and she agreed but said that the report was completed a month after the incident and Dr Venter could have made a mistake.

It was further pointed out to the plaintiff that the report prepared in terms of the Compensation for Occupational Injuries and Diseases Act talks about injured right foot and Dr Venter in her report talks about the left foot and she agreed.

The plaintiff was referred to the Criminal Court record particularly to a portion of the evidence where the plaintiff said that she was hit on her right foot and that, Dr Venter, in her report made no mention of the right foot and she agreed.

The plaintiff was again referred to the criminal record particularly where she said that she sustained an open wound below the knee which was bleeding and Mr Benade, the Chief Director at her place of employment, saw the bleeding wound. She was again referred to a statement made by the said Mr Benade and it was pointed out to her that Mr Benade made no mention of the bleeding wound and she agreed. It was also pointed out to the plaintiff that some of her colleagues, who saw her shortly after the incident, in their statements made no mention of any injuries sustained by her. The said colleagues are Mr George Daniel Schoonraad, Ms E.S De Kok, Mr Schoeman and Ms Nell-Marie Fouche. The plaintiff agreed that in the statements they made, there is no mention of injuries she allegedly sustained.

Furthermore, still under cross-examination, the plaintiff was asked about criminal charges which were preferred against her son, and she said that she does not know the type of charges her son was facing.

She further stated that her husband is not working but she cannot remember when he stopped working. She cannot remember if her husband was employed during 1995. Her

husband was at times doing odd jobs but she was the breadwinner at the time of the incident in question.

The plaintiff later said from 1976 after an accident, her husband never worked again and she became the breadwinner. She denied that her depression, at time or shortly after the incident in question was caused by the fact that her husband was unemployed and that her son was facing criminal charges.

The plaintiff, under cross-examination, conceded that in her evidence in chief before this court she said that the first defendant uttered the following words: “one boer one bullet – let us get rid of white supervisors” and when they left her office, the first defendant uttered the following words: “we will get rid of you, you white bitch”, but the said words were never mentioned by her during the criminal prosecution of the defendant.

The plaintiff further said that she received medical attention for a period of 2 years and that she is presently not employed and she is still having psychological and psychiatric problems.

Under re-examinations the plaintiff referred to a memorandum, which she signed on 27 October 1997, which was addressed to the Deputy Director General and other officials of the Department of Education where she was employed. In the said memorandum, the plaintiff set out the events of 7th August 1997. In the said memorandum she said that the first defendant amongst others, while singing, said: “one boer one bullet” and “let get rid of

white supervisors". In the said memorandum she also stated that the first defendant said to her "we will get rid of you, you white bitch".

She further testified that since leaving the Department of Education on the day of the incident in question, she had never applied for any work, although she is working for her children doing administrative work.

The next witness to be called was Dr Venter – she is a general medical practitioner although she has written her examinations towards an M.MED degree.

She testified that she has known the plaintiff for some few years before the date of the incident in question.

On 7th August 1997 she saw the plaintiff at her consulting rooms. The plaintiff was upset or distressed and she could not communicate with her. She examined her to check any physical injuries. She gave her an injection called Aterax to calm her. She had superficial injuries – her neck was red and swollen – right forearm had abrasions and was red and also an abrasion on the left calf.

In a medical report dated 11th August 1997 she described injuries of the plaintiff as injured ligaments, and very tense - right

foot bruised.

She also testified about her report dated 15th September 1997. In the said report she stated that the patient was seen by her on 7th August 1997 after being assaulted. The patient was upset and crying, her neck was red and swollen, right forearm was bruised and swollen and left calf was bruised and left ankle swollen (ligament injury). Ankle still tender.

She said that the above report, if she remembers well, was meant for the employer.

She further said that right foot was also bruised.

The above-mentioned injuries were apparently caused by trauma.

The plaintiff appeared to her to be suffering from post-traumatic stress disorder and was referred to a psychiatrist by her. Signs of the said conditions are crying, and trembling with fear and difficulty in communicating.

Under cross-examination she testified that on the day in question she never went to the scene of the incident in question.

When she completed the report dated 11th August 1997 she did not mention the healed injuries under the heading prognosis. That she did because the said forms deals with follow-ups of the injuries until the patient is ready to return to work. As she understood the

form, the information required is why was the patient not yet ready to go back to work. She was sorry that she did not mention the healed injuries.

She was informed that in her evidence, the plaintiff said that she was injured on her right leg and her report dated 15th September 1997 talks about injured left calf, and the witness said that she could have made a mistake. Her notes could be wrong including the evidence she gave in court because of the lapse of time.

After the witness had testified, the plaintiff legal team wanted to call Dr Herman Jacobs as a witness.

The defendants counsel objected saying that the expert evidence of Dr Jacobs as contained in the plaintiff's notice in terms of Rule 36(9) (a) and (b), will not assist the court as far as the merits are concerned as same deals with quantum.

In his report, which is part of the papers, Dr Jacobs, a psychiatrist talks about his psychiatric diagnosis of the plaintiff, her problems, treatment she was receiving and costs thereof. The report is dated 20th July 1999.

My view was that if Dr Jacobs is going to testify about issues raised in his above-mentioned report, the said evidence deals with quantum and will not assist the court to arrive at a just conclusion

as far as the merits are concerned.

The plaintiff's counsel requested the court to make a ruling on whether Dr Jacobs can testify, at this stage about the following issues:

1. That he evaluated the plaintiff and found that she suffered from post-traumatic stress disorder;
2. That the above-mentioned condition developed or arose as a result of the incident which occurred on 7th August 1997.

I gave the ruling that the said evidence will deal with the quantum only and will not contribute to the question of resolving merits and same will not be admissible at this stage of the proceedings.

After the said ruling, the plaintiff's legal team called Ms Elsie Susana De Kok as a witness.

She testified that on the 7th August 1997 she was employed by the Department of Education. On the day in question there was an unlawful protest/march at their offices.

Her immediate superior was the plaintiff and her office together with the office of the plaintiff were situated on the 4th floor.

She had known the plaintiff for several years and on the day of the incident, she saw the plaintiff in the morning and there was nothing wrong with the plaintiff.

Her office was about 6 metres from that of the plaintiff and the said offices were situated opposite to each other.

During the morning part of the day, she heard a group of people singing, dancing and screaming. They were on the lower floors and she heard them coming nearer their floor.

After some time, a group of people who were singing, dancing and screaming came into her office. They were about 20-30 in number.

She knew the first defendant and she saw him among the group of protesters. He was in front of the group. He was screaming hard and the other people were responding to his screams. At that time, she was in her office with her two colleagues, namely Mr Jan Skosana and Mrs Anna Tseleng. She heard the word "join" and she got the impression that they were urged to join the protest march. She further testified that "hulle het in hulle eie taal gepraat wat ek nie kon verstaan nie".

She further testified that after some few minutes, the group went out of the office and moved towards the office of the plaintiff.

She went outside her office and she saw the group entering the office of the plaintiff. The first defendant was part of the group that went into the office of the plaintiff. She went back to her office.

The singing and dancing continued in the plaintiff's office. She later heard a loud bang, as if a door was banged hard. After hearing the door close, she went to the plaintiff's office. She saw the said group of people going towards the lift. The door to the office of the plaintiff was closed - there was a small table in front of the said door and a big stapler was on top of the said table. The stapler in question was normally kept in the office of the plaintiff on top of the table. She shifted the table and went into the office of the plaintiff. She found the plaintiff sitting on an arm-rest of a chair and looking out of the window. Her office was in a chaotic state. Chairs were turned upside down, documents and files scattered all over the office and some documents and files lying on the floor and one of the big stapler was lying on the side of the table.

She identified photographs of the office that she took days after the incidents. The said photographs depicts the plaintiff's office being in a chaotic state.

On arrival in the plaintiff's office she asked the plaintiff what happened and the plaintiff informed her that the first defendant was dancing on her table, he kicked her and she moved backwards to avoid the kick and he also tried to clap her – he threw a chair towards her and she blocked same with her hand and on his way out, he threw her with a stapler. She also showed

her where the chair and stapler struck her. She showed her marks on her neck where she was hit by the first defendant. Injuries she sustained as a result of the chair and stapler were on her foot and arm. She was crying, shivering and shocked.

She further testified that when the group left, she went back to her office and the plaintiff was crying as she is not used to people singing and dancing in her office.

Mrs Fouche later came to her office and asked her to take the plaintiff to a doctor. She went with Mrs Fouche to the plaintiff's office and they heard the group of people coming again to the plaintiff's office. They locked themselves inside the plaintiff's office. The said people came and banged the prefabricated walls and the said walls were shaking. The plaintiff who was with them in the said office was screaming out of the window asking for help. They phoned the doctor and they were told that they can bring the plaintiff to the doctor's consulting rooms.

Together with Mrs Fouche they assisted the plaintiff to go out of her office. They were holding her on both sides. As the group of protesters were talking to the Deputy Director General next to the lifts on the 4th floor, they used the stairs up to the 3rd floor, got out of the lift on the 3rd floor and went to the ground floor with the plaintiff. They took her into the motor-vehicle of Mr Pretorius who took her to the doctor.

She saw a letter allegedly written and issued by NEHAWU dated 17th June 1997. The said letter, inter alia complains about Registry divisions headed by a white woman. She saw the said letter on the notice board and other places in the building. The plaintiff was head of Registry division and the said letter referred also to the Registry division.

Under cross-examination she testified that injuries she testified about were not mentioned in the statement she made to the police on 24th April 1998. In the said statement she did not mention any injuries allegedly sustained by the plaintiff.

The witness also conceded that on 9th September 1999, when she gave evidence in the criminal trial, in which trial the plaintiff was the complainant and the first defendant was charged for assault with intent to do grievous bodily harm, when asked whether the plaintiff was injured or not, she replied that she did not see any blood, although she had a scratch on her arm and leg.

When asked why during her testimony in the criminal trial she did not mention some of the injuries she mentioned during her evidence in chief in this hearing, she could not give any explanation.

She further testified that she was the first person to have

contact with the plaintiff after the incident in the plaintiff's office.

In her evidence she stated that the plaintiff was injured on the arm and leg without stating whether it was the right or left ones because she cannot remember whether it was the right or left arm or leg.

She did not see how the plaintiff sustained the alleged injuries and she cannot say that the plaintiff sustained the said injuries on the 7th August 1997.

When told that the plaintiff said that she was injured on her right leg, and Dr Venter said that the injury was on the left leg and that Dr Venter further said that she (Dr Venter) could have made a mistake, the witness did not comment.

She knows Mr Machete but she does not recall seeing him amongst or with the protest marchers on the day in question.

The plaintiff told her about the gas spray and she also experienced same but she did not mention the said fact in her evidence in chief because she did not think about it.

There were no incidents of misbehaviour reported from the other floors where the protest marchers went except on the 4th floor.

If any of the protesters used any vulgar words at any stage, she would have heard that.

The witness further said that the first defendant was not carrying anything and he did not threaten her. Last time when she saw the first defendant the first defendant was in front of the group but when they entered the plaintiff's office she did not see them.

When she entered the office of the plaintiff she smelled the gas from the gas spray gun of the plaintiff.

Photographs depicting the chaotic state of the plaintiff were taken by her on a Monday following the Thursday of the incident. Security people also have keys of the said office.

There was no ankle injury, which was indicated to her by the plaintiff.

Under re-examination the witness stated that the affidavit she gave to the police was typed by her.

After leading this witness, the plaintiff's legal team pointed out that they intent calling Dr P.H De Wet as a witness. They requested the Court to make a ruling on whether his evidence will be admissible or not.

The Court was informed that Dr De Wet will testify about some

of the issues contained in his report. The Court was advised that Dr De Wet will testify that:

- “2.1 Dat Mev Oosthuizen aan post-traumatiese spanningsversteuring, kroniese tipe, sekonder tot `n insident 7 Augustus 1997, ly;
- 2.2 Dat, nieteenstaande langtermyn en toepaslike behandeling, `n element van die versteuring steeds voortduur”.

The Court was referred by the plaintiff's legal team to the report of Dr De Wet in which he deals with full psychiatric evaluation of the plaintiff and his opinion and according to the said report he evaluated the plaintiff on 15th September 2003.

Dr De Wet was required to testify about some of the issues raised in his report and not his entire report.

The defendant's counsel objected that Dr De Wet should testify and submitted that his evidence will not assist the court to resolve the merits of the case and secondly that it is undesirable that Dr De Wet should testify in peace-meal.

The Court ruled that the evidence of Dr De Wet will not be admissible at this stage as the said evidence will not assist the Court to resolve the question of merits.

The plaintiff then called Ms N.M Fouche as the next witness.

She testified that on the day of the incident she was employed by the Department of Education as an Assistant Director, Personnel.

On day of the incident she went to work in the morning and went straight to her office to do her work.

At about 10h30, her senior, Mr Anton Schoeman asked her to go with him to the office of the Chief Director, Mr Benade. On arrival at Mr Benade's office, they found the plaintiff who was crying and shocked. She was informed by Mr Benade that the plaintiff was assaulted and she (the witness) should complete a claim form.

The form which she completed, was displayed to her and is headed "Werkgewer se Verslag oor 'n ongeval – Wet op Vergoeding ivm Beroepsbeserings en siektes, 1993 – Aikel 39 – Aanhangel 4". She obtained information from the plaintiff and completed the form. The said form required, inter alia, nature of the injuries of the employee. The plaintiff showed her injury on her right leg and she was crying and shocked. On the said form she recorded the injuries as "injured right leg and shock."

After completing the said form, she accompanied the plaintiff to her office to collect her bag so that she can be taken to a doctor. On arrival at the plaintiff's office, they found same in a chaotic state.

While still with the plaintiff in the plaintiff's office, Mrs De Kok came in – after a few seconds, they heard noises of people singing, screaming and stamping their feet. She locked the door – later she heard people banging the door and the walls. At that time, Ms De Kok, the plaintiff and herself tried to phone Mr Benade and the doctor in turns. The plaintiff screamed through the window for assistance.

A few minutes later, noise subsided and she heard somebody addressing the protest marchers. They decided to leave the plaintiff's office, and next to the lifts, they found the Deputy Director General addressing the group of protest marchers, and the first defendant was standing next to him.

Mr Pretorius came and took the plaintiff to the doctor and the witness went back to her office.

At a later stage, she was approached by a police officer for a statement relating to the incident in question. Her said statement is dated 24th April 1998. In the said statement, she did not mention that the plaintiff was injured on her right leg and shocked as she thought that it was not necessary and she is not a medical practitioner.

In her office, the plaintiff told her that her right fore-arm was

injured, but she did not show her the injury and this was after she had already completed the form mentioned previously.

Under cross-examination the witness stated that before 7th August 1997 she was not aware of the pending protest march.

She further said that a letter talking about the planned protest march of 7th August 1997 came to her attention on 6th August 1997 and when confronted about the fact that she earlier stated that she was not aware of the planned protest march, she said that she had forgotten about the above mentioned letter dated 6th August 1997.

The purpose of the form mentioned above, which she completed, was to enable the Workmen's Compensations Commissioner to decide whether to pay the injured employee or not. She completed the form on the basis of information supplied to her. Injuries she filled in the form, she saw them. The plaintiff did not show her injuries on her right arm and she was wearing a long sleeves top. She did not see nor had the plaintiff informed her about the injury on her neck. If the plaintiff had told her about the injury on her ankle, she could have mentioned same in the said form.

The witness testified that in her affidavit that she gave to the police, she did not mention that the plaintiff showed her her injuries

as the affidavit was made more than 8 months after the incident and she did not think that it was necessary to mention the said fact.

She did not think that what is contained in the WCC form should also be mentioned in her affidavit she gave to the police.

The witness further testified that she was told by the plaintiff's legal team that the civil case resolves around the question of the injuries sustained by the plaintiff and she was asked if she knows anything about the said injuries as she is the one who completed the "injury on duty forms".

The witness further testified that she was told, before testifying about evidence led by the plaintiff and Mrs De Kok, one of the witnesses who testified before her.

The witness admitted that in Court she testified that she attempted to go out through the window in the plaintiff's office to go and ask for assistance but the said fact was omitted in the affidavit she gave to the police. She explained that when she made her affidavit to the police, the said fact had escaped her mind.

The next witness for the plaintiff was Mr Phillip Benade who is presently the Deputy Director General and at time of the incident in question, he was the Chief Director in the Department of Education.

The plaintiff was employed at the time of the incident as a

Chief of Registrations, which section, fell under his division.

On the day of the incident he was at work. There was a protest march and the marchers were marching into the offices of different people in their building.

On the day in question, whilst still in his office, the plaintiff phoned him and informed him that the protest marchers were in her office. She was in a state of panic.

He was not concerned when the plaintiff phoned him because of his experience of the previous protest marches. He asked two colleagues, Messrs Schoeman and Schoonraad to accompany him to the plaintiff's office.

On arrival at the floor where the plaintiff's office was, they could not reach it as the passage was blocked by the protest marchers, and they returned to their offices. Picketing looked normal to him.

Few minutes later, the plaintiff who was hysterical and crying, phoned him again. He went to the plaintiff's office with Mrs Schoonraad. On arrival at the plaintiff's office, they found same in a chaotic state – protest marchers had moved to other floors.

They found the plaintiff in a corner of the office in a total state of shock and panic.

The witness testified that: "I think she had injuries on her leg, I think there were also marks on her neck, and I think also on one of her arms as well".

His main concern was the plaintiff's emotional state. He thinks that one of the staff members, Mrs De Kok, was also present in the plaintiff's office.

He took the plaintiff to his office, called Mrs Fouche from Personnel Department and asked her to complete the necessary form for an injury on duty. He identified the said form in Court, which was in one of the bundles.

The witness further testified that he requested that the plaintiff should be transported to a doctor as he was aware that the plaintiff could not drive herself to the doctor.

The witness testified that the plaintiff had injuries on the neck, leg and arm.

The plaintiff told him that, if he recalls correctly that the protest marchers entered her office and the first defendant jumped on her desk and danced on it, thrown her with a stapler and also struck at her, and she, the plaintiff, used the spray gun in the process.

When they left the plaintiff's office, he instructed that the plaintiff office should be locked and things in the said office should be left as they are. He thinks that the said office was locked by Mrs De Kok, who then kept the key.

He identified the photos which depicts the office of the plaintiff being in a chaotic state.

He knows that before the incident in question, the plaintiff was experiencing disciplinary problems with some of her subordinates, particularly the messengers.

He was told by the plaintiff that the first defendant, who was a shop steward for NEHAWU was spending too much time with the messengers behind closed doors.

The witness confirmed that some of the staff members received a threatening letter from NEHAWU signed by the first defendant.

He was told by his senior, Mr Du Preez, that they had a discussion with NEHAWU and the agreement reached was that there will be no picketing in future inside the building and in turn, the employer will stop investigation relating to the past protest marches and their incidents.

On Labour issues, they are guided by the Department of Public Services, Labour Relations Act and agreements reached at the Public Service Bargaining Council.

In a case of the labour actions, they rely on directives from the Department of Public Services.

The Department of Education cannot determine if the strike was protected or not.

A letter issued and distributed to the employees dated 6th August 1997, stating that the planned industrial action of the 7th August 1997 was not signed by the Director General but was signed by Mr Duncan Hidle, who was Chief Director, Labour Relations of the Department of Education.

The witness further testified that he did receive the memorandum from the plaintiff signed by the plaintiff on 31st July 1997. The said memorandum was dealing, inter alia, with complaints against the first defendant.

He did receive a letter from NEHAWU dated 17th June 1997 and he was unsettled by the contents thereof.

The plaintiff, who was in charge of registry division, fell under the supervision of Mrs Bagopa, an Assistant Director in the Department of Education.

He also received a memorandum prepared and signed by the plaintiff. The said memorandum was signed by the plaintiff on 27th October 1997. After receipt of the said document he referred same to the Director General for a response.

He also identified a memorandum which he wrote dated 14th May 1996. The memorandum suggested that the first defendant

and other employees be charged for misconduct. The first defendant was charged for misconduct but he was acquitted.

The witness agreed that he received a letter dated 13th January 1998 addressed to the Director General by the plaintiff. In the said letter, the plaintiff was enquiring if there was any steps taken against the first defendant for his misbehaviour on the day of the protest march on 7th August 1997, the question of her safety at work, etc. He thinks that they did not respond to the said enquiry.

The Department of Education prior to the incident in question did not have any policy on the question of protest march inside the building.

He is not aware of any other person who was injured on the day of the protest march except the plaintiff.

On a previous occasion, the protest marchers did come to his office.

He is aware that Mr Elias Hlatwayo died 2-3 years after the incident in question.

Under cross-examination he testified that as a Department they were expected to be lenient as far as the labour actions are concerned. Directives were issued informing them about unprotected strikes.

He is aware that when people protest, they sing, dance and ultimately hand in a memorandum. He agreed that Mr Sibanyoni, being one of the leaders of the Union, he will from time to time talk to the members of the Union.

On 7th August 1997, the defendants were entitled to engage in a labour action within the policy guidelines of the Department of Education. The policy guidelines indicated how to deal with unprotected labour action, for instance, “no work no pay” and it does not say that there will be no strike action.

The first defendant was an active member of the second defendant and also one of the leaders. Queries from employees were directed to him and he at times represented the employees during internal disciplinary hearings.

Some supervisors might get the impression that the first defendant is interfering with “working hours” when he is carrying out his functions as one of the leaders of the Union.

He was referred to a memorandum dated 24 June 1996 signed by the plaintiff and addressed to the Deputy Director and Director wherein the plaintiff was complaining, inter alia, about the manner in which the first defendant was interfering with the messengers and to another memorandum prepared by the plaintiff

dated 31 July 1997 addressed to the Assistant Director, Deputy Director, Director and Chief Director. In the said memorandum the plaintiff was again complaining about the first defendant.

He responded by stating that during that time they received a number of complains, but that does not mean that there was hatred between the staff and members of the Union.

He was again referred to another memorandum dated 14 May 1996 compiled by the plaintiff wherein she was complaining, inter alia, about the first defendant. He stated that he is aware that COSATU, during that period was planning a series of protest actions, and NEHAWU had to participate in the said protest actions as it was an affiliate of COSATU.

The purpose of the planned protest actions was to highlight the grievances of the workers and was directed against the Government. Before the 7th August 1997, the protesters came to his office singing and they handed to him a memorandum.

The Department of Education was aware of the “rolling mass action”, particularly that on the 7th and 8th August 1997 there would be protest marches at the Department of Education.

After the protest marches mentioned above, he received a complaint only from the plaintiff, except her, no other staff member

complained. The protest marchers moved from floor to floor, and went into various offices. They also came to his office but they did not assault him or verbally abuse him. When the protest marchers came to his office, they were led by Mr Masilela, who he knew very well.

Messrs Matjeni, Masilela and Hlatswayo were part of the leadership of the Union in the Department.

He cannot dispute the fact that Mr Matjeni was tasked with the duty of handing over the memorandum.

About 80 workers or members of the Union participated in the protest march.

At the relevant time, the office occupied by the plaintiff was 16 square metres in size and it could not accommodate about 80 singing protest marchers.

At the said time, he was Chief Director – Corporate Services. There was security personnel in the building.

There was no policy as far as the carrying of firearms in the workplace is concerned.

Carrying of pepper-spray and spraying other people there with was unacceptable. He is not aware of any permission given

to any person to carry a weapon or pepper-spray. He is not aware of any permission which was granted to the plaintiff to carry a pepper or gas spray.

The plaintiff informed her on 7th August 1997 that she used pepper-spray, although they did not receive any complaint from any person alleging that he/she was injured by the said pepper-spray. If such complaint was received, they would have completed the "injury on Duty forms".

It was pointed out to him that the injuries allegedly sustained by the plaintiff as she testified in Court differs from the injuries indicated on the Workman's Compensations Form completed by the employer and also differs from injuries noted by Dr Venter in her report dated 15 September 1997, and he said that he cannot remember whether the plaintiff was injured on the left leg or right leg.

He further testified that an error could have been made but the fact of the matter is that the plaintiff had visible injuries, and as a result of which he requested that the plaintiff should be taken to a doctor.

He was referred to the evidence of Mrs Fouche where she stated that she was not shown any injuries on the hand and that the plaintiff was wearing a long sleeves top, and he said that he

can not explain Ms Fouche's evidence. To the best of his recollection he was shown the said injury, and Ms Fouche was not in the plaintiff's office with him. He was shown the said injuries in the plaintiff's office. He was told about the injury on the neck.

He further testified that no person was charged with misconduct for assaulting the plaintiff.

It is possible that the protest marchers came to his office on 8th August and not on 6 August 1997.

Under re-examination he testified that he saw an injury on the leg of the plaintiff but he did not see any blood flowing. He saw certain injuries but he cannot recall details thereof and he also cannot recall whether they were old or fresh injuries. The plaintiff was also not in a good emotional state. She was shaking and in a state of shock.

He further testified that there was an agreement that a certain period or time can be spend by the workers on Union activities. There are managers and/or supervisors who are more negative to Union activities than others. There are instances where some supervisors are intolerant towards Union activities.

He was referred to a letter dated 17 June 1997, written by the Union to the Department complaining about certain issues. In the said letter the plaintiff's name, his name together with names

of other senior staff members were mentioned.

He said that they regarded the said letter as a threat to their jobs but not to their lives.

He further stated that if you look at the said letter in isolation, it is irrelevant to the incident of 7 August 1997.

The next witness to testify is Advocate Eben Boshoff.

He testified that he is employed by the National Department of Education as a Director – Legal Services. His responsibilities involve giving legal advise, drafting of legislation and assisting in the proclamation' etc.

He is aware of the labour action which took place during August 1997.

He was referred to a circular issued by the Department of Education dated 6 August 1997 and addressed to all staff members, and he said that that is one of the circulars that will come to his directorate for distribution. The said circular was dealing with the strike action of the Union planned for 7 and 8 August 1997.

The said circular, reads partly as follows:

“The Department wishes to inform all officials that it is an unprotected strike and officials who intent to participate in the above strike on 7 and 8 August 1997 are cautioned that

the Department will have no alternative but to apply the principle of no work no pay”.

During 1997, there was a restructuring in the Department of Education and the Department regarded the involvement of the Union as crucial, and as a result of which the Department refrained from taking any court action against the Union to stop the unprotected labour action.

On 7 August 1997 he was called to Mr Benade’s office – on his arrival at the said office, the plaintiff was not there as he learned that she was taken to a doctor. A report was made to him about an incident which occurred in the Registry division, although he cannot recall details thereof. The question of sick leave of the plaintiff was discussed.

He is not aware of any disciplinary enquiry instituted by the Department against the plaintiff.

He is not aware of any Department’s policy dealing with pepper spray. The Department did not institute a disciplinary enquiry against Mr Sibanyoni because, firstly, the reconciliatory approach of the Department towards the Union and secondly, it was their policy that if there are any criminal investigations they will await the outcome of the criminal trial. He further testified that the Department views racist’s remarks in a serious light and he is not aware of any complaints lodged against the plaintiff about

racists remarks allegedly made by her.

In cross-examination he testified that he did not witness any violence perpetrated by members of the Union nor seen any injured person.

He was informed that pepper-spray was used.

The plaintiff closed her case.

The first witness to be called by the defendants is Mr Ezekiel Johannes Sibanyoni. He testified that he is presently employed by the Department of Health as an Administration Clerk.

In August 1997 he was employed By the Department of Education and Training also as an Administration Clerk. He was a member of NEHAWU which he joined in 1994.

During August 1997 he was the Secretary of NEHAWU. His functions involved writing letters, distributing pamphlets, organising meetings with employers and also dealing with grievances of the workers. He was performing his functions as Secretary of NEHAWU during working hours.

During that period Mr James Masilela was Chairperson of NEHAWU at the workplace and Mr Joseph Matjeni was Deputy Chairperson.

At the workplace, the Union was confronted by several challenges, eg lack of transformation and lack of proper channels to address grievances of the workers.

He knew Mrs Oosthuizen from 1996 and he met her for the first

time at the Department of Education and Training. His relationship with her was normal. His view is that she did not like the Union – she had a lot of subordinates who were members of the Union and they were complaining about her. They took the matter to the superiors in the Department and wrote a letter complaining about the attitude of Mrs Oosthuizen.

At his place of employment he was never charged for misconduct of any nature nor for the activities of 7 August 1997.

On 7 August 1997 about 80 people participated in the protest march.

He was referred to a memorandum dated 24 June 1996 prepared and signed by Mrs Oosthuizen addressed to her superior. In the said memorandum Mrs Oosthuizen was complaining about him. He said that the said memo was never brought to her attention prior to him consulting with his legal team.

He was again referred to a letter which he wrote to the Director General apparently during July 1997 wherein he was complaining that Mrs Oosthuizen is harassing the workers. He then explained how Mrs Oosthuizen was harassing the workers.

He was referred to a letter dated 22 July 1997, written to the Union by the Director General as a response to his (Mr Sibanyoni's) letter of complaint addressed to the Director General earlier in that month.

He was again referred to a memorandum prepared by Mrs Oosthuizen, dated 31 July 1997 addressed to senior officials, in which memorandum Mrs Oosthuizen was complaining about his behaviour, and he stated that he first saw the said memorandum when he was consulting with his legal team. The same applies to a memorandum prepared by Mrs Oosthuizen, addressed to superiors and dated 14 May 1996.

He was referred to a letter addressed by NEHAWU to the Department wherein NEHAWU was requesting management to release members of the Union to participate in a protest march on 2 June 1997 at 10H00. The said letter is dated 27 May 1997, and he was again referred to a notice dated 18 July 1997 addressed to the Managers of the Department advising them about a protest

march organised by the Union which was going to take place on 25 July 1997.

He further testified that during that period, there were a good number of people who wanted to join NEHAWU but the officials were delaying to process their applications.

He was again referred to a letter addressed to all NEHAWU members informing them about a strike on 7 and 8 August 1997. The said letter was signed by Mr Dube, Provincial Secretary of NEHAWU.

After receipt of the letter or notice mentioned in the previous paragraph he put it on the notice board to inform the employees. The employer was aware of the pending strike.

He further testified that Mrs Oosthuizen office was small and it could not accommodate 20 people who are singing and dancing.

In terms of NEHAWU's Constitution, no member is allowed to misbehave – if a member misbehaves, he/she will be disciplined.

On 7 August 1997 NEHAWU did not allow any of its members to misbehave.

He denied that on 7 August 1997 he assaulted, attempted to assault, intimidated or verbally abused Mrs Oosthuizen.

He testified that on the said date, members of the Union assembled in front of the building of the Department of Education. Union officials informed the members as to how they are going to proceed.

They moved from one floor to another, and on each floor, they went to the office of a supervisor, where they handed a memorandum and advise him/her that there will be a strike very soon. On the first 3 floors, they did not experience any problems.

They went to the 4th floor – they first went to the office of Ms Gina

Gouws and from there they went to the office of Mrs Oosthuizen and that is where they met problems.

“Leadership” first entered her office and from there other members of the Union entered. He was in the middle and he only managed to go as far as the door of Mrs Oosthuizen’s office and other people were standing on the passage. He then heard the words: “Gaan julle uit kaffers met julle kaffer Unie”. He did not see the person who uttered the above mentioned words but he recognised the voice as that of Mrs Oosthuizen.

After hearing the words mentioned above his eyes started itching. People who were in front, inside the office, started pushing backwards and they also pushed those who were behind them. His eyes, face and respiratory tract were itching.

He ran to the toilet and washed his face – other Union members were coughing in the passage and others lying down on the passage and he went to fetch water for a certain lady so that she can wash her face.

The age of the protest marchers ranged from 30 – 60 years.

Mrs Oosthuizen was not provoked.

Prior to the protest march certain tasks were allocated to some of the members. The chairperson and his deputy were leading the march and they had a memorandum. He was tasked to control the members in the middle and treasurer was controlling the marchers at the back. He did not hand any memorandum to any official.

He was shown photographs depicting the office of Mrs Oosthuizen in a chaotic state and he said that he did not see the office of Mrs Oosthuizen in that state. Leadership of the Union was never called to see the state in which Mrs Oosthuizen office was.

After leaving the office of Mrs Oosthuizen they gathered in the passage to decide the way forward. They decided to approach the Minister's office to complain.

They were angry about the actions and utterances of Mrs Oosthuizen. Some of their members became ill and some of them died.

At the Minister's office, they met the Director General and they explained to him their complaints about the behaviour of Mrs Oosthuizen, and the Director General promised them that an investigation will be instituted to investigate their complaints.

He was detained for 28 days prior to being released on bail after Mrs Oosthuizen laid criminal charges against him. He has a family and during his detention there was nobody to look after his family and his wife was unemployed.

In cross examination he testified that he participated in several protest marches prior to 7 August 1997. He joined NEHAWU in 1994 and became a shop steward in 1996.

The protest march of 7 August 1997 was planned by the National Office nationally. Their grievances were, *inter alia*, low salaries and lack of transformation.

Dispute between their Union and the employer was referred to CCMA but he cannot remember the date of the referral.

He attended several Union meetings and they were instructed by their Union to participate in the "rolling mass action".

He was referred to the plea, particularly the paragraph which denies that the Union instructed its members to participate in the "rolling mass action" and he stated that the said plea is incorrect. When he instructed the attorneys he was acting on behalf of the Union and on his behalf, and he told the attorneys that they were instructed by the Union to participate in the industrial action. He

does not know why the plea states that NEHAWU did not give its members instructions to participate in the industrial action.

He was asked if he knows the difference between protected and unprotected strike and he answered in the positive. He further explained that in a protected strike there are certain procedures that must be followed and in an unprotected strike they come together and decide that they do not want to work.

He further testified that on 7 and 8 August 1997 they were not involved in strike but they were paving the way for a strike. On the said dates, they were demonstrating, and when you strike, you do not work. He was referred to a portion of the plea which talks about a protected strike, and he said that he only told their attorneys that they had a protest march and he did not use words contained in the plea.

He did not use the word strike as they were demonstrating and the employer was notified prior to their demonstrating. The notice of their planned demonstration was given to Mr Schoeman, an official in the Personnel and Human Resources department and a notice was placed on the notice board on each floor. In the notice, they were informing the employer that there will be demonstrations on 7 and 8 August 1997. He gave Mr Schoeman, one of the senior officials, a copy of the notice advertising the demonstrations, and put other notices on the notice boards for information of the workers.

He saw the letter from the Department dated 6 August 1997 stating that the principle of 'no work no pay' will be applied to those who participate in the intended demonstrations.

On the day of the incident, he did not go into Mrs Oosthuizen's office. He only came up to the door and there were people in front of him. The Chairperson and his Deputy had the memorandum. They went to the office of Mrs Oosthuizen to hand her their memorandum and to request her to release the workers on the day of the demonstration so that they can participate in the demonstration.

He could not see what was happening in the office of Mrs

Oosthuizen as he was at the door.

Messrs Hlalswayo and Magana died after the incident in Mrs Oosthuizen's office but he does not know the causes of their deaths.

Under re-examination he testified that he went to school up to Grade 12 and he had no tertiary education. He did not draft the plea, he does not know purpose of the plea and the plea in this case he saw it for the first time when he was cross examined.

Prior to any strike, there are discussions between Union members themselves and thereafter, if there is agreement, the employees go on strike.

The next witness to testify is Ms Sarah Makhubela. She testified that on 7 August 1997 to date, she is employed by the Department of Education and she is a member of NEHAWU. She knows Mrs Oosthuizen and Mr Sibanyoni as she once worked with them at the Department of Education.

On 7 August 1997 they were demonstrating. They were singing and going to different offices of directors and their Union superiors handed memorandums to different senior officials of the Department.

During the protest march the Union members were well behaved.

They came to the 4th floor, and those who were in front of the demonstrators went into the office of Mrs Oosthuizen. Mr Matjeni was in front and Mr Sibanyoni was controlling the protesters and she could not see them.

After entering the office of Mrs Oosthuizen those who were in front, immediately turned back, and she felt some substance which they inhaled choking them.

They also started pushing back to escape the smell of the

substance which filled the air and at that time, she heard Mrs Oosthuizen saying: "go out your kaffers with your kaffer Union".

When she was in the passage, a certain gentleman grabbed her by the hand, took her to the kitchen where she washed her face.

Mrs Oosthuizen was not provoked and she did not witness anybody assaulting Mrs Oosthuizen.

Under cross examination, she testified that on 7 August 1997 she was an ordinary member of NEHAWU and she was employed as a cleaner by the Department of Education.

At the time of the protest march they were many although she cannot recall how many they were.

During their protest march, senior officials of NEHAWU were in front and Messrs Masilela and Matjeni had the memorandum. She cannot recall other people who were in front of the protest marchers.

She did not see the memorandum being given to Mrs Oosthuizen because when she was about to enter her office, she felt the effect of the spray. At that time, she was about two metres away from the door.

Between her and the door of the office of Mrs Oosthuizen, there were other people. Those who were in front formed the first row, and she was in the second row.

Mr Sibanyoni was not in the front row. When they turned back, she does not know where Mr Sibanyoni was. She did not see Mr Sibanyoni standing at the door.

Prior to them feeling the effect of the gas, they were singing, although they did not disturb people in their offices. After the spraying of gas, there was no more singing.

She further testified that she does not know if Mrs Oosthuizen was injured on the day in question.

Under re-examination she said that she did not see Mr Sibanyoni handing the memorandum to Mrs Oosthuizen, nor did she hear Mrs Oosthuizen screaming.

The next witness to testify is Mr Joseph Matjeni.

He testified that he is employed by the Department of Education from 1994 to date.

He is a member of NEHAWU. In 1997 he was the Deputy Chairperson of the branch of NEHAWU and he is presently the Chairperson. In 1997 the Chairperson of the branch of NEHAWU was Mr James Masilela, and Mr Sibanyoni was the Secretary.

During the demonstrations that took place in August 1997 there were many people, with ages ranging from 33 years up to 64 years.

None of their members were charged for misconduct resulting from their participation in the demonstrations of 7 and 8 August 1997 and there was no money deducted from their salaries.

Prior to the demonstration, different people were allocated different tasks particularly the officials.

Together with Mr Masilela they were leading the protesters and he was having the memorandum. Mr Sibanyoni and a certain lady called Thoko were controlling the marchers from the back and giving them support in order to ensure that order prevails.

He did not witness any violence nor intimidations.

On 7 August 1997 they marched from ground floor and went up. At different offices of supervisors they went to, they were welcomed – after reading the memorandum to a senior official, they handed a copy thereof to those who requested for a copy. They did not encounter any problems on ground floor, first floor, second floor and third floor.

When they arrived on the 4th floor, the march was still led by Messrs Hlatwayo, Masilela and himself.

Leaders of the march entered Mrs Oosthuizen's office, and whilst other Union members were still coming, Mrs Oosthuizen sprayed them with her spray gun, and they started retreating and she uttered the defamatory words mentioned by other defence witnesses. They went out, and outside the said office, they saw other Union members.

Mrs Oosthuizen was not provoked. He is the last one to leave Mrs Oosthuizen's office, and no one returned to her office.

On leaving Mrs Oosthuizen's office he went to the tap water and assisted those who were more affected by the spray of Mrs Oosthuizen.

They decided to go to the office of the Minister to report the behaviour of Mrs Oosthuizen. At the Minister's office, they spoke to Mr Mseleku.

In cross examination, he said that the Branch Executive Committee consists of Chairperson, Deputy Chairperson, Secretary and Treasurer.

He was referred to a letter written by NEHAWU to the Director General, in which letter they were complaining about the alleged harassment of their members by Mrs Oosthuizen, and he commented and said that they wrote a lot of similar letters wherein they complained about the behaviour of other managers.

On the day in question, they were not striking, but they were demonstrating in preparations for a strike.

When they consulted with the lawyers they told them that they were demonstrating and not striking. Strike means staying home and not coming to work.

He further testified that he was the last person to leave Mrs Oosthuizen's office and the said office was not in a chaotic state at the time he left.

In re-examination he testified that he did not see any injuries

allegedly sustained by Mrs Oosthuizen.

The next witness to testify is Mr T Mseleku.

He testified that he is the Director General in the Department of Health. During August 1997 he was the advisor to the Minister of Education and he was stationed at the Head Office.

On 7 August 1997 he was at work. At no stage was he called to go and see an injured employee, namely Mrs Oosthuizen.

On 7 August 1997 during the activities of NEHAWU he was in the office which is in the same building where NEHAWU members were engaged in their activities.

At some stage, the NEHAWU members came to the Minister's office and requested for a meeting with him. They reported to him that they were insulted by one of the supervisors when they went to her to submit a memorandum, and furthermore that they were sprayed with teargas.

He promised them that he will follow up the matter with the Director General. After they had left he went to see the Director General to report the incident and he requested that the incident should be investigated.

At a later stage, they heard that the supervisor in question had laid criminal charges and they decided to wait for the outcome of the criminal case.

In cross examination he testified that he has been the Director General in the Department of Health for the past two and a half years.

In the Department of Education he was a special advisor and not part of management.

His position entailed, *inter alia*, providing the Minister with advice on broad educational issues and labour issues. He took part in Management meetings although he was not a line

manager.

When the NEHAWU members approached him and discussed with him, they were a good number and the discussions were led by Messrs Masilela, Sibanyoni and a certain Joseph, whose surname he cannot recall. They explained to him what happened at Mrs Oosthuizen's office. They also told him that they were also concerned about elderly people who were affected by the teargas that Mrs Oosthuizen sprayed. He did not verify their complaints. He dealt with this matter several times and he left the Department of Education in January 2005.

He further testified that the Director General, Education Department at that time had said that they should wait for the criminal trial to be finalised and he agreed with the said view.

The defendants closed their case.

It is trite that for the plaintiff to succeed, she must prove the allegations contained in her particulars of claim. She must prove, *inter alia*, that the first defendant intentionally assaulted her, alternatively attempted to assault her, alternatively intimidated her by kicking towards her alternatively threw a stapler at her, alternatively verbally harassed her and in doing so intimidated her. Furthermore, she alleges that the Union, which is the Second Respondent should be held liable for the actions of its members.

It is common cause between the parties that there was a protest march by members of the second defendant on 7 August 1997. It is also common cause that the first defendant was employed by the Department of Education at the relevant time, he was a member and an official of the second defendant and that he participated in the protest march on 7 August 1997.

It is also common cause that the protesters, on the relevant day, marched through the building, dancing and singing, moved from one floor to the other and went to different offices including the office of the plaintiff.

Mr Benade, who was Chief Director, in charge of Administration at the relevant time, testified that the plaintiff was chief of Registration which fell under his division.

Under cross-examination he testified that the Department issued a directive advising them about an unprotected strike of 7 and 8 August 1997 and that they were expected to be lenient with the protest marchers.

He further testified that after the protest march under discussion, they received a complaint only from the plaintiff. Protest marchers went to several offices including his office and they did not assault him nor verbally abused him and when they came to his office the protest marchers were led by Mr Masilela who he knew very well.

Mrs Oosthuizen testified that when she saw the protest marchers coming towards her office, Mr Sibanyoni was in front. On the other hand Mr Benade, testified that when the protest marchers came to his office, they were led by Mr Masilela.

Evidence of Mrs Oosthuizen contradicts the evidence of the defence witnesses, particularly Mr Matjeni who testified that together with Mr Masilela they were leading the protest march. Mr Sibanyoni also testified that he was not leading the protest marchers.

It is improbable that Mr Sibanyoni could have been in front when they came to her office. Probably, Mr Masilela who Mr Benade saw leading the marchers together with Messrs Matjeni and Hlatwayo, led the marchers through the entire protest march on the day in question as Mr Masilela was chairperson of the Union and Mr Matjeni was his deputy.

Mrs Oosthuizen testified about how she was assaulted and verbally abused by Mr Sibanyoni and other protest marchers.

She also described the injuries she sustained.

In the criminal trial, she testified about the injuries she allegedly sustained. In the present trial, Mrs Oosthuizen testified that Mr Sibanyoni clapped her on the left side of her neck. He threw her with a chair which she blocked with her arm, and threw her with a stapler which hit her on the leg – she was shocked by the people who were singing and dancing.

She described her physical injuries and scratches on the left side of her neck, bruises on her right arm and injured right leg where she was hit by the stapler.

She further said that she showed her bleeding wound to Mr Benade.

Dr Venter, who completed a medical report dealing with the injuries of Mrs Oosthuizen, mentioned *inter alia* that she was injured on the left ankle. During cross examination when it was pointed out to her that Mrs Oosthuizen testified about her injured right leg, she then said she could have made a mistake.

The Workman's Compensation Commissioner's Form which was completed shortly after the alleged incident at the workplace, does not mention some of the injuries Mrs Oosthuizen and Dr Venter testified about.

Mr Benade testified that he cannot recall if Mrs Oosthuizen was bleeding, and on the other hand Mrs Oosthuizen testified that she showed Mr Benade her bleeding wound. If she had shown Mr Benade her bleeding wound or any injury, Mr Benade would not have testified that he could not by looking at the alleged injury have known whether it was an old injury or not.

The Workman's Compensation form was completed on instruction of Mr Benade and in his presence. If Mrs Oosthuizen had shown him the bleeding wound, the probabilities are that that would have been reflected on the said form.

Mrs Oosthuizen is a single witness on certain material issues, particularly on the question of her alleged assault by Mr Sibanjoni and what transpired in her office.

The contradictions in the evidence tendered by Mrs Oosthuizen and her witnesses makes her testimony unreliable and contrary to probabilities. It is improbable that if she indeed sustained the injuries she testified about, there will be contractions mentioned above about the injuries she sustained in the alleged attack by Mr Sibanyoni.

The defence witnesses testified that Mr Sibanjoni was not leading the protest marchers and Mr MBenade also testified that when they came to his office, Mr Sibanjoni was not leading the protest marchers. On this point too, the probabilities are against her.

There is also no reason that could be advanced why the protesters misbehaved in the office of Mrs Oosthuizen, a tendency they did not display in other offices they went to. The probabilities are that the protest marchers did not behave, in Mrs Oosthuizen's office as alleged by her.

The evidence tendered by the Plaintiff in the criminal trial is materially different from the evidence she tendered before this court.

During this trial, she testified that she could not understand what the protest marchers were singing about, but what she understood was when they said "One boer one bullet – let us get rid of white supervisors". In cross examination it was pointed out to her that the above mentioned words were never mentioned by her in the criminal trial and she agreed.

Mrs Oosthuizen, in this trial, further testified that during the time Mr Sibanyoni was assaulting her, he further said: "We will get rid of you you white bitch". During cross examination it was pointed out

to her that the said words does not appear in the criminal record and she also agreed.

Mrs Oosthuizen also testified that after the assault, she went to Mr Benade's office and after "injury on duty" form were completed, she went back to her office. On arrival at her office she met some of the staff members crying. They informed her that Mr Sibanyoni came back to her office and he told them (the said staff members) that if they do not participate in the protest march, he will hit them with a sjambok. This piece of evidence seems to be improbable because, if the said staff members ever spoke to Mrs Oosthuizen about their intimidations by Mr Sibanyoni, one would expect them to have reported the incident. We know that according to Mr Benade, except Mrs Oosthuizen, no other person reported any incident.

As pointed out earlier, all indications are that the evidence of Mrs Oosthuizen cannot be relied upon and it is contrary to probabilities.

Furthermore, the protesters were singing and dancing when they moved from floor to floor. Their singing and dancing could not have shocked Mrs Oosthuizen to the extent she alleged particularly if she did not understand the language that they were using.

Her allegations that the protest marchers said: "one boer one bullet – let us get rid of white supervisors" is also false. No other staff member who testified heard the protest marchers saying the said words, otherwise, they could have testified about same.

I find that Mrs Oosthuizen has failed to establish that the actions of Mr Sibanyoni and other Union members shocked her as she alleges.

My view is that the plaintiff had failed to discharge her onus.

The defendants bear an onus to prove the allegations as contained in their counter claim.

In her plea to the counter claim, the plaintiff introduced a special plea in terms of which she pleaded that the claim of the

defendants has prescribed as the counterclaim was instituted after expiry of a period of three years from the date of the incident.

In the replication the defendants stated that the defendants, consulted for the first time with their legal representatives on 19 September 2000, and that was the first time they came to know about their right to defamation and that they were entitled to counterclaim.

Section 12 of the Prescriptions Act 68 of 1969 provides that prescription start running as soon as the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises.

The facts of this case and the identity of the plaintiff were known to the defendants from the date of the incident.

The special plea of the plaintiff should be upheld.

At the beginning of this trial, the defendants launched an application in terms of Rule 33(4) of the Rules of Court, for separation of merits and quantum.

The plaintiff opposed the application, but stated that they do not oppose the separation of merits and quantum but the Court should make a qualified order in terms of Rule 33(4). An order in terms of the defendant's notice of motion was granted. Costs were reserved for determination at the end of the trial.

At the close of the plaintiff's case, the defendants applied for absolution and their application was dismissed. Costs were reserved for determination at the end of the trial.

My view is that, when one considers the facts of this case, a fair order to make on both reserved costs and the costs of the trial is that each party should pay his/her or its costs.

I therefore make the following order:

- 1. The plaintiff's claim is dismissed.**
- 2. The defendants counterclaim is dismissed.**
- 3. Each party to pay its own costs.**

p/LVS

W.L SERITI
JUDGE OF THE HIGH COURT