

IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT. PRETORIA)

CASE NO: 20614/2008

DATE: 7 MAY 2010

IN THE MATTER BETWEEN

RUCILLE BOTHA

FIRST PLAINTIFF

RUAN BOTHA

SECOND PLAINTIFF

AND

MINISTER OF SAFETY & SECURITY

DEFENDANT

JUDGMENT

PRINSLOO. J

[1] This is a damages action instituted by the first and second plaintiffs against the defendant Minister.

The damages claims arise from the death of the first plaintiffs late husband who was also the second plaintiffs father and bread-winner.

The alleged damages flow from emotional shock and resultant physical *sequelae* suffered by the first plaintiff as a result of the death of her husband and loss of support suffered by the second plaintiff.

Broadly speaking, the plaintiffs allege that the death of the husband and bread-winner could have been prevented but for the breach, by servants of the defendant, acting within the course and scope of their employment, of a legal duty towards the deceased and negligence on the part of those servants.

[2] In the trial before me, Mr Havenga SC assisted by Mr De Wet appeared for the plaintiffs and Mr Bester assisted by Mr Shakoane appeared for the defendant.

[3] After institution of the proceedings, and before commencement of the trial before me, the parties agreed upon a written statement of facts in the form of a special case of adjudication in terms of the provisions of Rule 33(1) of the Uniform Rules of Court.

[4] For illustrative purposes, and for the sake of brevity, it is convenient to quote the contents of the written statement of facts or "stated case" as it is more commonly known:

“1.

1.1 The first plaintiff is Rucille Botha, an adult woman born on [...] 1959.

1.2 The second plaintiff is her son. Ruan Botha, who was born on [...] 1983.

1.3 The first plaintiff was married in community of property to Jan Andries Botha (hereinafter referred to as 'the deceased') who was born on [...] 1948.

1.4 It is common cause that the deceased passed away on 9 September 2005 under the circumstances described below and had during his lifetime a legal duty to support both plaintiffs and in fact supported them up to the date of his death. It is further common cause that both plaintiffs were dependent upon the deceased and that he would continue to support them had he not passed away on 9 September 2005.

2.

The deceased and a certain Justice Baloyi ('Baloyi') were both employed by Express Air Services at its perishable goods section at the Johannesburg International Airport.

3.

On 31 August 2005 and at the offices at Express Air Services, Johannesburg. Baloyi threatened the deceased that he would shoot and kill him and thereafter kill himself. The deceased laid a charge against Baloyi at the South African Police Services as appears from a copy of his statement annexed hereto marked annexure 'A'. A docket was opened by the police on 6 September 2005 with reference number CAS 99/09/05. Constable Magagula was one of the police officers tasked with investigating the complaint against Baloyi. It was known to the deceased and to the police that Baloyi was the owner of a firearm for which a licence had been issued to him.

3.

On or about 6 September 2006 Baloyi was suspended from Express Air Services and told to return for a disciplinary hearing.

4.

Arrangements were made that members of the South African Police Services would be present at the offices of Express Air Services w'hen the disciplinary' hearing takes place in order to protect the employees of Express Air Services, including the deceased.

5.

The South African Police Services were aware of the fact that Baloyi was the owner of a weapon, a Lorinco 9mm Parrabcllum semi-automatic pistol, for which a licence had been issued to him by the South African Police Services. A certain Constable T L Magagula w'as tasked to confiscate Baloyi's weapon. On 6 September 2005 he endeavoured to trace the suspect but could not find his house since the houses were not numbered. On 8 September 2005 Captain Marshall gave specific instructions to Constable Magagula to trace the suspect, Baloyi, and obtain his warning statement and confiscate his firearm. Constable Magagula was also specifically requested by the deceased to be present when the disciplinary hearing takes place.

6.

Baloyi was found guilty of misconduct during the disciplinary hearing and dismissed from the employ of Express Air Services. A copy of a statement by Constable Magagula, in which he explained his version of what happened, is annexed hereto marked annexure 'B'¹. For purposes of the stated case the parties accept the correctness of Magagula's affidavit. According to Constable Magagula he found the suspect, Baloyi, waiting at the reception area whilst his fate was finally been (*sic*) determined at the disciplinary hearing. Baloyi was then called into the meeting and after a few minutes Constable Magagula was informed that Baloyi was indeed dismissed and that he had to accompany him so that he can remove his personal belongings from a locker in a small changing room downstairs. A copy of the statement of Alfred Oberholster regarding the disciplinary hearing is annexed hereto marked 'Y'.

7.

Constable Magagula accompanied Baloyi to the changing room where Baloyi informed him that he did not have a key to the locker. Constable Magagula then asked the deceased to fetch a crow-bar in order to break open the locker. Whilst Constable Magagula was busy breaking open the locker Baloyi allegedly went into a toilet in the same changing room and shortly thereafter shot the deceased in the

passage outside the locker room and then shot himself. The deceased later died as a result of the wounds sustained in the shooting. The toilet is out of sight of the place where the lockers are situated. During the time that Baloyi and Constable Magagula were alone in the locker room, they were joined by another employee of Express Air Services, Dumisani Gumede, who heard the two men talking. When he left the locker room, he also found the deceased standing outside the door of the locker room. His affidavit as to what took place and which forms part of the official inquest, is annexed hereto marked annexure 'C' and for purposes of the stated case, the parties accept the correctness of his statement.

8.

At no stage after the deceased made his affidavit regarding Baloyi's threats and after the police opened a docket, did the police search Baloyi or confiscate his weapon. The deceased was shot with Baloyi's weapon for which he had a licence.

9.

The plaintiffs have lost their right of support from the deceased as a result of his death. The parties have settled the *quantum* of the plaintiffs' claims in an amount of R140 000.00 made up as follows:

9.1 first plaintiff in respect of her claim for damages and shock R60 000.00;

9.2 second plaintiff in respect of his claim for loss of support R80 000,00.

10.

It is not in dispute that the first plaintiff has suffered emotional shock (as more fully set out in the report of Dr Louise Olivier).

The remaining questions are whether the defendant had a legal duty towards the deceased as pleaded in paragraph 6 of the particulars of claim, and whether employees of the defendant, including Constable Magagula, had acted unlawfully and negligently as pleaded in paragraph 7 of the plaintiffs' particulars of claim and thereby caused the plaintiffs loss.

Dated at Pretoria on this the 23rd day of March 2010."

[5] It is also convenient to quote paragraph 6 of the particulars of claim, which, *inter alia*, refers to the statutory provisions relied upon by the plaintiffs, and also paragraph 7 of the particulars of claim which

details the acts of negligence relied upon:

“6.

Die oorledene se dood was te wyte aan die nalatige verbreking van 'n regsplig wat op die Suid-Afrikaanse Polisie diens gerus het om die oorledene te beskerm en om te verhoed dat Baloyi sy dreigement om die oorledene te skiet, sou uitvoer. In besonder:

6.1 In terme van die bepalings van die Wet op die Beheer van Vuurwapens, 60 van 2000, het die Suid-Afrikaanse Polisie diens wye magte en ook verpligtinge. In besonder het die Suid-Afrikaanse Polisie diens die regsplig om toe te sien dat die oogmerke van die Wet op die Beheer van Vuurwapens, 60 van 2000, bereik word. Die oogmerke sluit in dat elke persoon, insluitende die oorledene, beskik oor die reg tot lewe en die reg tot veiligheid van daardie persoon, wat verder insluit die reg om vry te wees van alle vorme van geweld van óf publieke óf private oorsprong, dat die toereikende beskerming van hierdie regte grondliggend is aan die welsyn en maatskaplike en ekonomiese ontwikkeling van elke persoon en dat die Grondwet 'n plig plaas op die Staat om die regte soos vasgelê in die Handves van Regte te respekteer, te beskerm, te bevorder en te verwesenlik, veral met inagneming van die feit dat die toenemende beskikbaarheid en misbruik van vuurwapens en ammunisie beduidend tot die hoë vlakke van geweldsmisdade bydra.

6.2 As sulks het die Suid-Afrikaanse Polisie diens 'n regsplig teenoor die oorledene gehad om hom te beskerm teen geweldsmisdade wat mag voortspruit uit die gebruik van vuurwapens.

6.3 Die Suid-Afrikaanse Polisie diens het verder wye magte onder hoofstuk 2 van die Strafproseswet, en in besonder artikel 20(1) van genoemde Wet soos aangevul en gewysig deur artikel 110 van die Wet op Beheer van Vuurwapens, 60 van 2000, om 'n persoon wat op redelike gronde geglo word om in besit of onder beheer te wees van 'n vuurwapen, en 'n gevaar van skade aan homself of enige ander persoon kan inhou, te deursoek en beslag te lê op gemelde vuurwapen, hetsy die vuurwapen gelisensieer is of nie.

6.4 Dit was redelikerwys voorsienbaar vir 'n redelike polisiebeampte, beide toe die klagte deur die oorledene by die polisie diens gelê is, en op die stadium toe konstabel T Magagula by die oorledene en Baloyi aangesluit het, dat Baloyi in besit was van 'n vuurwapen en dat hy die vuurwapen sou gebruik om die oorledene mee te skiet.

6.5 Die redelike polisiebeampte in die posisie van die persone wat die klagtes ontvang en ondersoek het, of moes ondersoek het, en in die posisie van konstabel Magagula, sou opgetree het teen Baloyi ten einde die oorledene te beskerm.

Die optrede van Baloyi (my note: I think this should be a reference to Magagula) en die ander onbekende polisiebeamptes na wie hierbo verwys is en wat almal opgetree het binne hulle diensbestek met die verweerder, was onregmatig en nalatig in die volgende opsigte:

7.1 hulle het versuim om behoorlike aandag te gee aan die klagte wat die oorledene gelê het;

7.2 hulle het versuim om Baloyi te arresteer en te deursoek vir vuurwapen;

7.3 hulle het versuim om Baloyi se vuurwapen van hom af te neem en daarop beslag te lê;

7.4 hulle het versuim om redelike stappe te neem om te verhoed dat Baloyi die oorledene skiet;

7.5 hulle het versuim om redelike stappe te neem om die voorval waartydens die oorledene gedood is, te verhoed terwyl die neem van redelike stappe, insluitende die deursoeking van Baloyi en die beslaglegging op die wapen, sou verhoed het dat Baloyi die oorledene skiet."

[6] In his comprehensive address, Mr Havenga reminded me that Magagula allowed Baloyi out of his sight on two occasions. Firstly to go to the toilet and secondly while Magagula was busy breaking open the locker.

[7] It was also submitted that Magagula had ample opportunity to search Baloyi and to confiscate the firearm. He could have done so when he met him at the reception before the disciplinary hearing, and also when Baloyi was placed in his custody after the disciplinary hearing. In my view, he could, and should, also have done so after Baloyi had emerged from the toilet on the first occasion.

[8] Magagula also arrived at the Express Air premises late and failed to bring his back-up constable with him.

[9] It was submitted by counsel, correctly in my view, that had Magagula searched Baloyi and confiscated the weapon, as he was entitled to do in terms of the statutory provisions referred to. and had he kept him under close observation during the whole time after his dismissal, the shooting incident would not have happened. In these circumstances it was also established, so it was argued, that the causality test had been complied with, namely that it had been shown that there was a causal link between the breach of duty by the police and the death of the deceased.

[10] Counsel for the plaintiffs also referred me to the case of *Minister of Safety & Security v Van Duivenboden* 2002 6 SA 431 (SCA). The plaintiff had sued the Minister for damages sustained as a result of being shot by one Brooks. The basis of the claim was that the police were negligent in failing to take steps

that were available in law to deprive Brooks of his firearms before tragedy occurred notwithstanding the fact that there were grounds for doing so, and that their negligence was a cause of the respondent being shot. Before the incident, the police had been in possession of information which reflected on his fitness to possess firearms long before the respondent had been shot. An appeal against a decision by the Full Bench of the Cape Provincial Division that the Minister was liable was dismissed by the Supreme Court of Appeal.

[11] In *Van Eeden v Minister of Safety & Security* 2003 1 SA 389 (SCA) the facts were that the plaintiff had been raped by an escaped prisoner. It was held, at 400G-401A, that the police had owed the plaintiff (appellant) a duty to act positively to prevent the escape of the prisoner. The existence of such a duty accorded with the legal convictions of the community and there were no considerations of public policy militating against the imposition of such a duty. This conclusion stemmed from the state's constitutional duties. The police had control over the prisoner, who was known to them to be a dangerous criminal who was likely to commit further sexual offences against women should he escape. The constitutional provisions dealt with by the Supreme Court of Appeal in that case, included section 12(1)(c), section 7(2), section 39(1)(b) and section 205(3).

[12] In *Minister of Safety & Security v Hamilton* 2004 2 SA 216 (SCA) a decision by the Cape Provincial Division holding the Minister liable was upheld on appeal. The police had issued a firearm licence to a lady who had shot the plaintiff during an altercation in a parking bay. It was clear that the perpetrator was unfit to possess a firearm because of known facts that she had a history of psychological and emotional disturbance and was receiving counseling and therapy from several mental health professionals.

[13] Against this background, and bearing in mind that the facts set out in the stated case and the statements thereto annexed are common cause, I am satisfied that a proper case was made out by the plaintiffs to prove liability on the part of the defendant.

[14] It appears from the stated case that the *quantum* was settled in the amounts of R60 000.00 for the first plaintiff and R80 000.00 for the second plaintiff.

[15] As to costs, it was common cause before me that the case, involving complex issues, justified the employment of two counsel. Both parties before me did so.

[16] In the result, I make the following order:

1. judgment is granted in favour of the first plaintiff against the defendant for payment of the amount of R60 000,00 with interest at the rate of 15,5% per annum calculated from date of judgment to date of payment;

2. judgment is granted in favour of the second plaintiff against the defendant for payment of the sum of R80 000,00 with interest at the rate of 15,5% per annum calculated from date of judgment to date of payment;

3. the defendant is ordered to pay the costs of the plaintiffs which will include the costs of two counsel and the qualifying fees of the expert Dr Louise Olivier, including the costs of obtaining her report.

WRC PRINSLOO

JUDGE OF THE NORTH GAUTENG HIGH COURT

20614-2008

HEARD ON: 23 MARCH 2010

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