



IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 70062/2009

Date: 16 May 2013

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
16/5/2013	<i>Pretorius</i>
DATE	SIGNATURE

In the matter between:

GERHARD PHILIP RETIEF VAN ROOYEN
NATALIA VAN ROOYEN

1st Plaintiff

2nd Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

PRETORIUS J.

[1] The plaintiff's instituted action against the Minister for Safety and Security arising out of an incident on 1 March 2009 at Klapperkop,

Pretoria in which it is alleged that Cst RT Mahlke wrongfully shot at the plaintiffs whilst in the employ of the defendant.

[2] It is alleged by the plaintiffs that the said Cst Mahlke was acting in the course and scope of his employment with the defendant when he shot at the plaintiffs. Furthermore it is alleged that there was a legal duty on the defendant not to employ Cst Mahlke negligently without ascertaining whether Cst Mahlke was not a person inclined to crime, without psychologically evaluating Cst Mahlke to ascertain whether he is a competent person to be appointed as a policeman after he had disclosed criminal inclinations after he had been appointed as a police officer. Furthermore it is alleged, that after Cst Mahlke had shown criminal inclinations during November 2007 the defendant failed to relieve Cst Mahlke of his service pistol, alternatively failed to institute an inquiry in terms of section 102 of Act 60 of 2000 to ascertain Cst Mahlke's competence to possess a firearm.

[3] The action of damages is for the emotional shock suffered by both plaintiffs as a result of the defendant's actions by not withdrawing the official firearm which had been issued to Cst Mahlke, which had resulted in Cst Mahlke, wrongfully threatening and attacking the plaintiffs.

[4] Counsel for the plaintiffs requested the court to find that the actions of the defendant were directly responsible for the emotional shock suffered by the plaintiffs, alternatively that the defendant should be vicariously held responsible for the actions of Cst Mahlke.

[5] The defendant, in the light of the evidence of the clinical psychologist, Dr Kobus Truter, does not dispute that each of the plaintiff's suffered emotional shock as a consequence of the incident at the Fort Klapperkop lookout point. The court, therefore, does not have to deal with this dispute as it has been admitted by the defendant.

Background:

[6] On 1 March 2009 at 17h15 the first plaintiff, accompanied by the second plaintiff, drove to the lookout point at Fort Klapperkop. They parked and had the car's windows open and were talking to one another. Their vehicle was the only vehicle present at the lookout point. The first plaintiff had his firearm in the car. They noticed a vehicle, a Toyota Tazz, which parked alongside plaintiffs' vehicle and the driver wound down his vehicle's window, enquiring where Brooklyn Mall is and the first plaintiff gave directions. There were two occupants in the car. The driver had a large pistol on his right hip when he alighted from the Tazz and approached the plaintiffs in their vehicle – he dropped the keys to his vehicle and then grabbed and cocked the firearm. He approached the second's plaintiff's side of the vehicle and pointed the

firearm at her. The first plaintiff warned him not to do so, but he did not adhere to the warning.

[7] The first plaintiff fired a shot at the man on his wife's side of the vehicle as he was sure the person would shoot the second plaintiff and he simultaneously heard the man firing a shot at them. The first plaintiff immediately drove off as he was not sure where the attackers were. As he was driving away he saw Cst Mahlke, the deceased, lying in the road with his pistol next to him. They called an ambulance, went to the police and laid a charge of attempted hi-jacking.

[8] On members of the South African Police Services attending the scene it was found that the driver of the Toyota Tazz, who been fatally shot was Cst Romeo T Mahlke ("Cst Mahlke"). Cst Mahlke was a member of the SAPS attached to the National Mobile Train Unit.

[9] The following day the first plaintiff was arrested on a charge of murder and released on bail of R1,000.00. On 9 June 2009 the Director of Public Prosecutions decided not to prosecute the first plaintiff.

[10] It is common cause that there was an incident during November 2007, which resulted in a charge being laid against Constable Mahlke for pointing of a firearm and a second charge of discharging a firearm

in a public place. These charges were withdrawn by the complainant in the case on 24 January 2008.

[11] These charges were laid as a result of Cst Mahlake's actions on 23 November 2007. On 23 November 2007 at 23h30 Cst Mahlake tried to enter a nightclub in Sunnyside with a beer in his hand. The bouncer at the door refused him entrance with the beer in his hand, which resulted in him going to his car and fetching his firearm. He cocked the pistol and pointed it at the bouncer. He then returned to his car, firing a shot into the air. His firearm was taken from him after his arrest. After the case had been withdrawn by the Director of Public Prosecutions on the basis that the complainant and Cst Mahlake had settled the matter, his official firearm was returned to him. It is common cause that this was the same firearm that was used during the Klapperkop incident on 1 March 2009.

[12] There was a direction by a senior officer in the employ of the defendant that an inquiry in terms of section 102 of the **Firearms Control Act 60 of 2000** had to be held into Cst Mahlake's fitness to possess a firearm, after the case against him had been withdrawn. No such inquiry was held and no disciplinary proceedings were held in connection with Cst Mahlake's actions at the nightclub.

[13] It was further common cause that Cst Mahlake was in possession of a police radio and bulletproof vest issued by the defendant, at the time of the incident and that these items were found on his person and in his car at the scene.

[14] Mr Ferreira, for the plaintiffs, argued that the court should find that the defendant was directly liable for Cst Mahlake's conduct, as there was a duty of care on the defendant to determine the fitness of Cst Mahlake to hold a firearm. It was, in effect admitted by the defendant that an inquiry should have been held in terms of section 102 to determine the fitness of Cst Mahlake to be in possession of an official firearm after the incident of 23 November 2007.

[15] In **Feldman (Pty) Ltd v Mall 1945 AD 733** at 741 Watermeyer CJ held:

"... a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work..." (Court's emphasis)

[16] In **Minister of Police v Rabie 1986 (1) 117 AD** at p 134 Jansen

JA found:

*"It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (cf Estate Van der Byl v Swanepoel 1927 AD 141 at 150). The test is in this regard subjective. **On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.**"* (Court's emphasis)

[17] This *dictum* was dealt with by the Constitutional Court in **K v Minister of Safety and Security 2005 (6) SA 419 (CC)**. O'Regan J found that the test set out in Rabie's case (*supra*) is sufficiently flexible to incorporate the constitutional norms as well as other norms. O'Regan J held at para 44 and 45:

*"Thus developed, by the explicit **recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.***

[45] *The common-law test for vicarious liability in deviation cases as developed in Rabie's case and further developed earlier in this judgment needs to be applied to new sets of facts in each case in the light of the spirit, purport and objects of our Constitution. As courts determine whether employers are liable in each set of factual circumstances, the rule will be developed. The test is one which contains both a factual assessment (the question of the subjective intention of the perpetrators of the delict) as well as a consideration which raises a question of mixed fact and law, the objective question of whether the delict committed is 'sufficiently connected to the business of the employer' to render the employer liable.*" (Court's emphasis)

[18] In **F v Minister of Safety and Security 2012 (1) (SA) 536 (CC)** the Constitutional Court dealt with vicarious liability. The question as to the connection between the crime and the perpetrator's employment was dealt with in para 52 where the court found:

*"The normative components that point to liability must here, as K indicated, be expressly stated. They are: **the State's constitutional obligations to protect the public; the trust that the public is entitled to place in the police; the significance, if any, of the policeman having been off duty and on standby duty; the role of the simultaneous act of the policeman's commission of rape and omission to protect***

the victim; and the existence or otherwise of an intimate link between the policeman's conduct and his employment."

(Court's emphasis)

[19] The court further found at para 61:

"[61] These constitutional duties resting upon the State, and more specifically the police, are significant in that they suggest a normative basis for holding the State liable for the wrongful conduct of even a policeman on standby duty, provided a sufficiently close connection can be determined between his misdeed and his employment." (Court's emphasis)

[20] The court dealt with the question of trust where a police man is employed and found at para 62:

"[62] A further factor connecting the wrongful act at issue here with the policeman's employment is trust. This factor operates both normatively, in laying the basis for holding the State liable for the misdeed of even an off-duty policeman, provided there is a sufficient connection with his employment, and factually, in that it creates the connection between the employment and the wrongful conduct."

(Court's emphasis)

[21] In **Minister of Safety and Security v Hamilton 2004 (2) SA 216 SCA** Van Heerden AJA held a paragraph 44:

"[44] As already stated, I am of the view that, had the relevant police members executed their legal duties properly, they would have come to the compelling conclusion that McArdell was not fit to possess a firearm."

[22] In **Minster of Safety and Security v Duivenboden 2002 (6) SA 431 SCA** at pare 22 Nugent JA found:

*"In this case we are concerned only with whether police officers who, in the exercise of duties on behalf of the State, **are in possession of information that reflects upon the fitness of a person to possess firearms are under an actionable duty to members of the public to take reasonable steps to act on that information in order to avoid harm occurring.**" (Court's emphasis)*

[23] The principles enunciated in the abovementioned authorities must be applied to the present case to determine whether the defendant is liable.

[24] The first test the court has to apply is the "but for" test. In the present case the policeman, Cst Mahlke, in the employ of the defendant, had been known by the defendant to act irresponsibly when

using his firearm, as can be seen from his actions when confronted by the bouncer on 23 November 2007. These actions of Cst Mahlke lead to a prosecution, which was only withdrawn when the matter was "settled" with the complainant. It is clear from the direction of the senior officer that the matter was serious enough to justify an enquiry by the employer in terms of section 102 of the Firearms Control Act. The question as to what would have happened had the defendant held such an inquiry can only be answered if the circumstances of Cst Mahlke's actions are taken into consideration. In the Hamilton decision (*supra*) van Heerden AJA set out a para 43:

*"[43] With regard to the first leg of the enquiry (factual causation), it must be remembered that a plaintiff is not required to prove the causal link with certainty, **but simply to establish that the wrongful and negligent conduct complained of was probably a cause of the loss sustained.**"* (Court's emphasis)

[25] Mr Bester, for the defendant, argued that if Cst Mahlke had not had his service firearm it was more than likely that he would still have procured a firearm and held up the plaintiffs. The court finds that in this instance this argument is not based on any evidence. It was reasonable to have expected the defendant to take positive measures to prevent the harm, by having held an inquiry in terms of section 102 during 2007 or 2008 to ascertain whether Cst Mahlke was competent to have a fire-arm.

[26] The court takes cognisance of the dictum in **Minister of Safety and Security v Duivenboden** (*supra*) and finds that the defendant failed to take a reasonable steps to avoid harm, which was a wrongful omission by the defendant. The question should thus be whether a reasonable person in the position of the defendant would have foreseen harm in these circumstances and would have acted to avert the actions of Cst Mahlke.

[27] The court finds that a reasonable person in the position of the defendant would have acted after the criminal actions of Cst Mahlke became known in 2007. Furthermore the defendant realized that some action was necessary in the circumstances and directed that an inquiry be held in terms of section 102. There is no indication as to why the inquiry was not held. These actions of the defendant caused Cst Mahlke to be in possession of his service firearm. The court finds that there was a duty on the defendant to ensure that the section 102 inquiry be held and that the defendant failed to do so.

[28] In **Minister of Safety and Security v Duivenboden** (*supra*) Nugent JA approved the test for negligence as set out in **Kruger v Coetsee 1966 (2) SA 428 AD** at para 430 E – F:

For the purposes of liability culpa arises if -

(a) a diligens paterfamilias in the position of the defendant

- (i) *would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*
- (ii) *would take reasonable steps to guard against such occurrence; and*

(b) the defendant failed to take such steps."

[29] In the present case the defendant should reasonably have foreseen that harm may ensue should the section 102 inquiry not be held to determine whether Cst Mahlke was fit and competent to be in possession of his service firearm. Had there been an inquiry it is foreseeable that Mahlke would have been found unfit to possess a firearm, if cognisance is taken of his behaviour on 23 November 2007.

[30] The argument by counsel for the defendant that the incident involving the plaintiffs at Fort Klapperkop would have occurred, irrespective of the section 102 inquiry having been held and Cst Mahlke's firearm withdrawn cannot be seriously entertained. There is no indication or evidence whatsoever that in the event of his official firearm being withdrawn, that Cst Mahlke would have unlawfully acquired the possession of a firearm to further his criminal behaviour.

[31] To find vicarious liability the court has to find whether the connection between the conduct of Cst Mahlke and his employment

was sufficiently close to render the defendant liable. In **F v Minister of Safety and Security (*supra*)** the court held at para 48:

"[48] What flows from this test and the test in K, is that even if the nature of the conduct giving rise to the delictual claim suggests that the employer did not or could not have authorised that conduct, and even if the deviation is great in respect of space and time, that would not necessarily exempt the employer from liability. The employer could still be held vicariously liable if a connection exists between the conduct complained of and the business of the employer. That link must, however, be a real and sufficiently close one." (Court's emphasis)

[32] Cst Mahlke did not hold up the plaintiffs and shoot at them in the furtherance of the constitutional mandate of his employer. The subjective test as set out in **K v Minister of Safety and Security (*supra*)** does not establish State liability in this case.

[33] Therefore, according to **K v Minister of Safety and Security (*supra*)** the second question *"does not raise purely factual questions, but mixed questions of fact and law."*

[34] The State's constitutional obligations to protect the public; the trust the public is entitled to place in the police, the omission by the

defendant to hold a section 102 inquiry, the omission of withdrawing Cst Mahlke's weapon are all factors to be taken into consideration.

[35] The plaintiffs had a constitutional right to security of person and had a right to expect to be protected by police and that the defendant would act in such a way as to prevent harm to the citizens of the country by their employees.

[36] In **F v Minister of Safety and Security (*supra*)** at para 67 it was held:

"[67] I accept that the distinction between a policeman who is on duty and one who is off duty is a relevant factor in determining the closeness of the connection between the wrongful act and the perpetrator's employment. I do not accept, however, that it is determinative of whether the State may be held liable."

(Court's emphasis)

[37] If this is so, then the fact the Cst Mahlke was off duty is of no consequence as it was the omission by the defendant to act in terms of section 102, or at all that lead to Cst Mahlke holding up the plaintiffs with his service weapon. In this matter the employment provided the means to commit the crime.

[38] In **Minister of Safety and Security v Duivenboden** (*supra*)

Nugent JA dealt with accountability in para 22:

*"There is no effective way to hold the State to account in the present case other than by way of an action for damages and, in the absence of any norm or consideration of public policy that outweighs it, **the constitutional norm of accountability requires that a legal duty be recognised. The negligent conduct of police officers in those circumstances is thus actionable and the State is vicariously liable for the consequences of any such negligence.**"* (Court's emphasis)

[39] This requirement of "a sufficiently close connection" between the act of a member of the defendant for his own interests and the business of the defendant prevents giving rise to absolute liability. However in the present matter, the court finds a sufficiently close connection between Mahlake's acts and the defendant's omission in holding the section 102 inquiry. The defendant is thus vicariously liable for the damages for emotional shock to the plaintiffs.

[40] I have considered all these facts, authorities and argument by counsel and come to the conclusion that the plaintiffs have proved on a balance of probabilities, in these particular circumstances, that the defendant is liable for the damages as claimed by the plaintiffs.

[41] Counsel for the plaintiff argued that interest on the amounts should be granted from the date of the letter of demand, whilst counsel for the defendant argued that interest should only be granted from the date the summons was issued. I have considered this carefully. In **West Rand Estates v New Zealand Insurance Co Ltd 1926 AD 173** at 183 Solomon JA found:

“There is no satisfactory reason for following any other practice, and we think that we should now definitively lay down the rule that mora begins to run from the date of receipt of the letter of demand.”

[42] This has been the dictum followed throughout and approved once more in **Thoroughbred Breeders Association v Price Waterhouse [2001] 4 AllSA 161 (A)**.

[43] This court finds that there was a letter of demand in the present instance and therefor *mora* should run from the date of the letter of demand.

[44] The following order is made:

A. FIRST PLAINTIFF

1. The Defendant is declared to be liable for the damages suffered by the First Plaintiff as a result of the incident which occurred on

1 March 2009 at Fort Klapperkop, Pretoria.

2. Payment of the sum of R4 780.00 in respect of past psychological treatment by Dr P J Visser.
3. Payment of the sum of R24 887.00 in respect of future psychological treatment.
4. Payment of the sum of R50 000.00 as general damages in respect of claim 2.
5. Payment of the sum of R13 680.00 in respect of legal expenses incurred in respect of claim 2.
6. Interest on the aforesaid amounts at 15.5% per annum *tempore morae*, the *mora* date being 22 August 2009.
7. The Defendant is directed to pay the First Plaintiff's costs in the trial for the determination of the merits of the action which costs shall include:
 - 7.1 The costs of senior counsel;
 - 7.2 The costs of the reports by Dr Kobus Truter as well as his qualifying and appearance fees;

7.3 The costs of the report by Mr J J C Sauer.

8. The trial for the determination of the quantum of general damages in respect of the First Plaintiff's first claim is postponed *sine die*.

B. SECOND PLAINTIFF

1. The Defendant is declared to be liable for the damages suffered by the Second Plaintiff as a result of the incident which occurred on 1 March 2009 at Fort Klapperkop, Pretoria.
2. Payment of the sum of R4 780.00 in respect of past psychological treatment by Dr P J Visser.
3. Payment of the sum of R29 737.00 in respect of future psychological treatment.
4. Interest on the aforesaid amounts at 15.5% per annum *a tempore morae*, the *mora* date being 22 August 2009.
5. The Defendant is directed to pay the Second Plaintiff's costs in the trial for the determination of the merits of the action which costs shall include:

- 5.1 The costs of senior counsel;
 - 5.2 The costs of the reports by Dr Kobus Truter as well as his
qualifying and appearance fees;
 - 5.3 The costs of the report by Mr J J C Sauer.
6. The trial for the determination of the quantum of general
damages in respect of the Second Plaintiff's claim is postponed
sine die.



Judge Pretorius

Case number	: 70062/2009
Heard on	: 15 April 2013
For the Applicant / Plaintiff	: Adv Ferreira SC
Instructed by	: JW Wessels
For the Respondent	: Adv Bester
Instructed by	: The State Attorney
Date of Judgment	: 16 May 2013