REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: 6895/2002

17/8/2012

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

2012.08.17 ....

DATE SIGNATURE

In the matter between:

JOHANNAH NTEBENG RAMUSHI Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY Defendant

JUDGMENT

MAKGOKA, J:

[1] This is a delictual claim. The plaintiff was shot by an off-duty police officer on 12 March 1999, the latter using his service pistol. The officer, Velly Smangaliso Selinda (Selinda), was admittedly in the employ of South African Police Service (SAPS). The Minister is sued nominally as the political head of SAPS. The plaintiff sustained severe injuries to her stomach and chest. The nature and extent of those injuries are not necessary for the present purposes, as I am called only to determine the issue of liability. The parties have agreed to a separation of issues in terms of s 33(4) of the Uniform Rules of Court.

[2] In her amended particulars of claim, the plaintiff had alleged the following with respect to the police's negligence:

'5C. Lede van Suid-Afrikaanse Pollisiediens handelende binne die aard en omvang van hulle diensbestek het nalatigversuim om hierdie regsplig n ate kom, deur nie te bevind dat VS Selinda nie geskik was om 'n dienspistool te besit , alternatiewelik in besit van 'n dienspistool te bly nie in die besonder in die lig daarvan dat die Verweerder bewus was, alternatiewelik redelikerwys bewus moes gewees het dat VS Selinda klagtes as lid van die Suid-Afrikaanse Poliesiediens teen hom gehad het, *inter alia*, dat hy:

(a) 'Incautious handling of firearm' – 10 April 1994;

(b) 'Negligent firing of firearm'- 25 September 1994

(c) 'Shooting incident'-30 April 1995;

(d) 'Drunk in public place and pointing of firearm' – 18 December 1995'

5D. Nieteenstaande voormelde kennis, alternatiewelik moes lede van die Suid-Afrikaanse Polisiediens redelikerwys kennis gedra het van vooermelde feite, het nalatig versuim om VS Selinda se bevoegheid om 'n dienspistool te besit in te trek alternatiewelik sy voortgesette besit daarvan behoorlik te ondersoek.

5E. As gevolg van voormelde versuim, was VS Selinda op 12 Maart 1999 in besit van so 'n dienspistool, welke dienspistool gebruik is om die Eiser te skiet, as gevolg waarvan die Eiser skade gely het.'

[3] It is common cause that at the time of the incident, the SAPS had knowledge of the incidents mentioned in paragraph 5C, referred to above. The full particulars of those incidents, concerning the handling or use the service pistol by Selinda, are as follows:

(a) Incautious handling of a firearm

On 10 April 1994 he was asleep on duty while his service pistol was on his person; he was internally charged, convicted and sentenced to R50.00 to be docked from his salary.

(b) Shooting incident

On 30 April 1994 Selinda was had been posted at Union Buildings in Pretoria, manning the entrance gate. According to his statement, two police officers approached him and informed him that they were looking for a suspect who had ran away from them. They gave him the description of the suspect. A while later he saw a person fitting the description given to him by the police. He asked that person to approach him, but the person fled. He pursued him and fired a warning shot with his service pistol but the person persisted in fleeing. He later caught up with him and arrested him.

(c) Negligent discharging of a firearm

On 25 September 1994 Selinda was trying to place a firearm in a sage when a shot accidentally went off. No one was injured. Minimal damage was done to property.

(d) Pointing a firearm

On 18 December 1995 Selinda, allegedly drunk in public, unlawfully pointed a firearm. He was charged, convicted and sentenced to a fine of R3000 or five years' imprisonment of which R2000 or four months imprisonment was suspended for five years on standard conditions.

[4] On the above facts, the parties stated the following questions for determination:

(a) Whether the alternative claim of the plaintiff in paragraphs 5A-5E of the particulars of claim introduced by way of an amendment on 29 September 2006 had become prescribed;

(b) Whether the defendant had a 'duty of care' to ensure that Selinda only remain in possession of the service pistol as long as he was a fit and proper person to remain in possession thereof;

(c) Whether the defendant, having regard to the incidents referred to in paragraph 1.9 above, unlawfully omitted to properly investigate Selinda's suitability to remain in possession of the service pistol and/or to remove the service pistol from his possession;

(d) Whether the defendant, having regard to the incidents referred to in paragraph 1.9 above, was negligent in respect of the injuries sustained by the plaintiff as a consequence of her having been shot by Selinda;

(e) Whether any unlawful omission on the part of the defendant is causally linked to the shooting incident during which Selinda shot the plaintiff with the service pistol;

(f) The parties agree that, should it be found that the plaintiff's alternative claim mentioned in paragraph 2.1 *supra* has become prescribed then the plaintiff's claim ought to be dismissed;

[5] The issue of prescription mentioned in (a) above, was not referred to at all by either counsel during oral argument. I proceed on the assumption that this point was abandoned.

[6] Before I consider the specific facts of the present case, it is useful to set out the applicable jurisprudential framework within which such matters are considered. In order to succeed with her claim, the plaintiff has to establish that that there was a legal duty on the defendant's servants (the police), to dispossess Selinda of his service pistol. If that duty is established, and the police are found

to have negligently breached that duty, the next enquiry is whether such negligence caused the plaintiff to suffer harm, which was reasonably foreseeable or not too remote. If all these are established, the police's omission would be wrongful and attract liability. I consider these concepts, in turn.

The legal duty

[7] This duty is often referred to as 'the duty of care' (which is a concept of English law). I will therefore use the term guardedly, bearing in mind the remarks of Harms JA[1] (as he then was) that to formulate the issue in terms of the concept of 'duty of care' may lead one astray. The concept of 'duty of care' comprises two discrete enquiries. Milner *Negligence in Modern Law* (1967) at p.230 states:

> 'The duty of care concept in negligence operates at two levels. At one level it is fact-based, at another it is policy-based. The fact-based duty of care forms part of the enquiry whether the defendant's behaviour was negligent in the circumstances. The whole enquiry is governed by the foreseeability test, and 'duty of care' in this sense is a convenient but dispensable concept. On the other hand, the policy-based or notional duty of care is an organic part of the tort; it is basic to the development and growth of negligence and determines its scope, that is to say, the range of relationships and interests protected by it. Here is a concept entirely divorced from foreseeability and governed by the policy of the law. 'Duty' in this sense is logically antecedent to 'duty' in the fact-determined sense. Until the law acknowledges that a particular interest or relationship is capable in principle of supporting a negligence claim, enquiries as to what was reasonably foreseeable are premature."

[8] In *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) Botha JA, at 27G-I, citing with approval the passage in Milner, said:

> "The existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case. The general nature of the enquiry is stated in the well-known passage in Fleming *The Law of Torts* 4th ed at 136, quoted in the *Administateur, Natal case supra at 833 in fine 834A:*
>
> 'In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.'

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[1] In *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 14.

The enquiry encompasses the application of the general criterion of reasonableness, having regard to the legal convictions of the community as assessed by the Court..."

The passage in Fleming's work has undergone some modification in the eighth edition (1992, at p 139) in that the first sentence has been omitted and the second sentence begins: "in the decision whether to recognise a duty in a given situation ..."; but it is the passage in the fourth edition which has been twice approved by the Appellate Division and which has also recently been relied on by the Full Bench of the Transvaal Provincial Division in the decision in *Bowley Steels (Pty) Limited v Dalian Engineering (Pty) Limited* 1996 (2) SA 393 (T) at 398G-H

(See also *Minister of Defence v Mkhatswa* [1997] 3 All SA 376 (W) at 379 *ad fin* and 380a-c).

Negligence

[9] In *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G the test for negligence was stated as follows:

'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 has failed to take such steps.

... Where a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down.'

(see the modification of this test in *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) para 31, in light of subsequent developments).

Causation

[10] It is settled that establishment of negligence, is not the end of the enquiry, and liability does not necessarily follow for the damages suffered. For liability to arise there must be a causal nexus between such negligence and the plaintiff's damages. Causation represents a dual problem on different levels of enquiry. This was authoritatively enunciated in the leading case of *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34F-H and 35A-D by Corbett JA (as he then was):

> "Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question whether the negligent act or omission in question caused or materially contributed to ... the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz whether the negligent act or omission is linked to the harm sufficient closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This basically a juridical problem in which considerations of legal policy may play a part."

(See also *Siman & Co (Pty) Ltd v Barclays National Bank* 1984 (2) SA 888 (A) at 914C-918A; *Tuck Commissioner for Inland Revenue* 1988 (3) SA 819 (A) at 832F-G; and *Silver v Premier, Gauteng Provincial Government* 1998 (4) SA 569 (W) at 574D-G).

[11] In *International Shipping Co. (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) Corbett CJ at 700E-H restated the general principles of causation as follows:

> "As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensured or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this was not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closed or directly to the loss for legal liability to ensure or whether, as it is said, the loss it too remote."

[12] In determining the presence of legal causation, the question is whether the negligence of the police officers was linked sufficiently closely or directly to the loss suffered by the plaintiff for legal liability to arise, or whether the loss is too remote. The test applied in such an enquiry is trite and settled: it is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all come into consideration (see *S v Mokgethi en Andere* 1990 (1) SA 32 (A) at 39D-41B; *International Shipping*

above, at 700E-701G; *Smit v Abrahams* 1994 (4) SA 1 (A); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 764I-J and 765A-B and *Delphisure Insurance Brokers v Dippenaar* 2010 (5) SA 499 (SCA) para 25.

Wrongfulness in delict

[13] The development of wrongfulness as a criterion for determining the boundaries of delictual liability has its basis and foundation in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A). In that case the Appellant Division found that our law had reached the stage of development were an omission is regarded as unlawful when the circumstances of the case are of a nature that the legal convictions of the community demand that the omission should be considered wrongful.

[14] As a general proposition, there is constitutional and public law duty on the State to protect its citizens and the State is liable for the failure to perform that duty, unless it can be shown that there is compelling reason to deviate from that principle (see *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA) para 43). In *Minister of Safety and Security v Duivenboden* 2002 (6) SA 431 (SCA) paras 20 and 21 the Supreme Court of Appeal held that determining wrongfulness in these matters involves the balancing of identifiable norms, which include constitutional norms. An important constitutional norm that will factor in cases such as these is the norm of accountability (see also *Olitziki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para 31). This view has received the approval of the Constitutional Court in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) paras 73-78.

[15] Generally, accountability concerns would favour delictual liability but, that is not always the case. As pointed out by Nugent JA in *Van Duivenbonen*, para 21, there might be factors that militate against the imposition of liability, which would include the availability of an alternate remedy, the possibility that imposing liability might undermine the functioning of the State organ in question, the convenience of

administering a rule that liability will be imposed in these circumstances, the possibility of limitless liability and whether the plaintiff is best placed to protect himself against loss. It is generally only when these concerns are net that the value may require the recognition of a legal duty under the wrongful enquiry.

[16] In the context of delictual damages, the test for determining wrongfulness or otherwise of an omission to act is as restated in *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA).

> 'Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, *inter alia*, upon its perception of the legal convictions of the community and in considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered.'

(See also *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) paras 14 – 17; *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) para 6; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para [11] and [31]; *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) para 13; and *Van Duivenboden* above, para 16).

[17] The concept of the legal convictions of the community always plays an important role in determining wrongfulness. In applying this concept, the Court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of

the community must further be seen as legal convictions of the legal policy makers of the community, such as the Legislature and Judges (see *Schultz v Butt* 1986 (3) SA 667 (A) at 679D-E; *Premier Hangers CC v Polyoak (Pty) Ltd* 1997 (1) SA 416 (A) at 422E-F and *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA).

[18] Having set out the applicable general principles, I turn now to the facts of the present case. In argument, Mr. *Scheepers*, counsel for the plaintiff, arguing for the finding of liability on the part of the police, relied on s 12 of the repealed Arms and Ammunitions Act 75 of 1969 (the repealed Act). Counsel contended that the police, fully knowing of Selinda's conviction, should have known that by operation of law, he was deemed to be declared unfit to possess a firearm, unless the court had decided otherwise. On that basis, so argued counsel, the police should have removed the service pistol from Selinda's possession. To appreciate counsel's argument, s 12 provided that:

> (1) A person who is convicted by a court in contravention of a provision of this Act relating to the unlawful possession of an arm without the required licence, permit or other authorization, or of section 39 (1) (i), (j), (k), (l) or (m), or any other offence in the commission of which an arm was used (excluding any such conviction following upon the payment of an admission of guilt fine to be declared unfit to possess an arm, unless the court determines otherwise.
>
> ....
>
> (3) The court shall upon convicting any person referred to in subsection (1) or where the court exercises a discretion as referred to in subsection (2), bring the provisions of the subsection concerned to the notice of such person and afford him an opportunity to advance reasons and present evidence why he should not be declare unfit to possess an arm.

[19] Mr. *Bester*, counsel for the Minister, urged me, quite forcefully, to disregard Mr *Scheepers*' reliance on s 12, contending that such reliance was not pleaded. Counsel argued it was not the plaintiff's pleaded case that the Minister was liable for any wrongful omission by the police in failing to deprive Selinda the firearm in terms of s 12, and was being raised for the first time in argument. The short answer to this submission is that pleadings must be read as a whole. The plaintiff need only plead

the salient facts upon which she relies for the conclusion that the police had breached the legal duty (which duty is admitted in the plea).

[20] The plaintiff alleged in her amended particulars of claim (paragraph 5B) that there is a duty on the police to ensure that those of their members issued with service pistols, are, and remain fit, to possess their service pistols. This is admitted by the Minister. To my mind, it is implicit in this allegation that the police had a duty to ensure, among others, that those within their ranks convicted of specified offences, are dispossessed of their service pistols. On a reading of the pleadings as a whole, I am satisfied that the primary premise on which the plaintiff's claim is based, has been sufficiently pleaded. In any event, even if there is merit in this argument, it makes no difference to the outcome of the case, as would be clear later in the judgment.

[21] Mr *Bester*, for the Minister, pointed out that the Commisioner of Police's power to withdraw Selinda's possession of the service pistol was confined to the jurisdictional requirements of s 11 of the repealed Act, which empowered the Commissioner of Police to declare persons to be unfit to possess arms. It provided:

> "(1) If the Commissioner is of the opinion that on the ground of information contained in a statement made under oath, other than such a statement made by the person against whom action in terms of this section is contemplated, there is reason to believe that any person is a person-
>
> (a) ......
>
> (b) who has threatened or expressed the intention to kill or injure himself or any other person by means of an arm; or
>
> (c) whose possession of an arm is not in the interest of that person or any other person as a result of his mental condition, his inclination to violence, whether an arm was used in the violence or not, or his dependence on intoxication liquor or a drug which has a narcotic effect; or;
>
> (d) who, while in lawful possession of an arm, failed to take reasonable steps for the safekeeping of such arm,
>
> (e) ......

> he may, by notice in writing delivered or tendered to such person by a policemen, call upon such person to appear before the Commissioner at such time and place an may be specified in the notice, in order to advance reasons why such person shall not be declared unfit to possess any arm on any ground aforesaid so specified.'

[22] Counsel submitted that none of the jurisdictional requirements for the exercise of the Commissioner's power was present in this case. I do not agree. In considering the applicability of the section, one should have regard to its overriding purpose, which was clearly to give the Commissioner the power to ensure that firearms remain only in the hands of responsible and fit persons to possess them. On a proper construction of s 11, the Commissioner could have acted on either of (c) or (d). Selinda's inclination to violence can be inferred from the first the two incidents on 30 April and 18 December 1994, respectively. His failure to take reasonable steps to safeguard a firearm is borne out by the respective incidents on 10 April and 25 September 1994. Any of Selinda's colleagues or superiors should have proceeded to place on oath, these incidents to the Commissioner. None of them did, under circumstances where they were expected to do so.

[23] Even if this conclusion is wrong, I find astonishing, and untenable, the proposition that because Selinda's conduct did not fall on all fours within the jurisdictional factors of s 11, nothing could be done to withdraw his service pistol, even in light of glaring danger to society posed by his continued possession of the service pistol. I would be surprised if there are no internal processes to regulate the use and handling of service pistols by members of SAPS. That internal process would have allowed the police to withdraw Selinda's service pistol.

[24] That there was a public law duty on the police to withdraw Selinda's service pistol should be clear under the circumstances. There was sufficient information at their disposal to do so. The four incidents, in my view, demonstrated a potential danger by Selinda's continued possession of his service pistol. I was informed from the Bar that Selinda had joined the police service in 1993. This

means that in less than two years, he had chalked up the four incidents involving the handling and use of a firearm. To that extent, he was, as at 12 March 1999, unfit to remain in possession of a firearm.

[25] The police did not have to wait for him to be declared unfit to possess a firearm by a court. Besides, it is difficult to understand how a person with a criminal record remained a member of the police service, let alone continue to possess a service pistol, which he had demonstrated, on no less than four occasions, to be clearly unfit to possess. The police adopted a supine attitude to potential danger posed by the continued possession of a service pistol by Selinda. In my judgment the police were clearly negligent in their omission to withdraw the pistol from Selinda.

[26] That finding brings me to the issue of foreseeability. It is to be borne in mind when considering this aspect that the precise or exact manner in which harm occurs need not be foreseeable: only the general manner of its occurrence. In *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Storage (Pty) and Another* 2000 (1) SA 827 (SCA) ([2000] 1 All SA128), Scott JA stated the following at 840 D-E:

> "The problem is always to decide where to draw the line, particularly in those cases where the result is readily foreseeable but not the cause. This is more likely to arise in situations where, for example, one is dealing with a *genus* if potential danger which is extensive, such as fire, *or where it is common cause there is another person whose wrongdoing is more obvious than that of the chosen defendant*. It is here that a degree of flexibility is called for. Just where the inquiry as to culpability ends and the inquiry as to remoteness (or legal causation) begins – both of which may involve the question of foreseeability – must therefore to some extent depend on the circumstances.... In many cases the facts will be such as to render the distinction clear, but not always. Too rigid an approach in borderline cases could result in attributing culpability to conduct which has sometimes been called negligence "in the air".'

[27] In my view it was indeed reasonably foreseeable that if Selinda remained in possession of his service pistol a citizen could be harmed. From Selinda's previous handling and use of the service pistol, it was only a matter of time before he did something tragic, either to himself or to an innocent person. The unfortunate person was the plaintiff, whose right to bodily integrity was violated. In *Hamilton* the right to bodily integrity and security of the person was confirmed as one of an individual's

absolute rights of personality, with reference to *Minister of Justice v Hofmeyer* 1993 (3) SA 131 (a) at 145I-146C.

[28] A brief consideration of a number of relevant decisions, in which negligent failures have attracted liability, shows that our courts attach much weight to the right to bodily integrity and personal safety. In *Seema v Lid van die Uitvoerende Raad vir Gesondheid, Gauteng* 2002(1) SA 771 (T) a seriously disturbed mental patient was negligently allowed to escape from a mental institution. He proceeded to kidnap and rape the plaintiff's daughter. The Minister, whose servants had allowed the escape, was liable for the damages.

[29] In *Van Duivenboden,* above, the Minister was held liable to a plaintiff who was shot by a person where a number of police officers who knew that he was unfit to possess a firearm and was inherently dangerous had negligently failed to take steps in terms of s11 of the Arms and Ammunition Act 75 of 1969 to ensure that he be deprived of his weapons. Similarly, the Minister was held liable in *Van Eeden* above, a case in which the plaintiff was raped after the police had negligently allowed a dangerous criminal who was likely to commit further sexual offences to escape from custody some months before.

[30] In *Carmichele* v Minister of Safety and Security and Another (Centre For Applied Legal Studies Intervening)* 2001 (4) SA 93 (CC) 2002 (1) SACR 79; 2001 (10) BCLR 995 it was held that the police were under a duty to protect individuals by taking active steps to prevent dangerous persons held in the prison from escaping into the community if they were likely to commit acts of violence if they did so escape. In *Van der Spuy v Minister of Correctional Services* 2004 (2) SA 463 (SE) a by-stander had sustained certain gunshot injuries during the course of a prison escape. He was shot by one of the escaping prisoners. The Minister was vicariously held liable to the plaintiff for damages suffered.

* To be distinguished from the SCA judgment concerning the same parties, referred to in para [14] above.

[31] To sum up. I come to the conclusion that the police breached their legal duty by neglecting to take steps to withdraw Selinda's service pistol in light of the known incidents discussed in the judgment. Their negligence causally led to the shooting of the plaintiff on 12 March 1999. The duty of the police to act positively with respect to the continued possession of the firearm by Selinda, in my view, accords with the legal convictions of the community and there are no considerations of public policy militating against the imposition of such duty.

[32] As in *Van Duivenboden*, one is not dealing here with a situation involving particular aspects of police activity in respect of which the public interest is best served by denying an action for negligence. I conclude that the present case falls within those where liability should ensue, to the extent that the plaintiff has no other effective remedy against the State, other than an action for damages. I can think of no public policy to dictate otherwise. Considerations of public or legal policy, consistent with our constitutional norms, would demand the imposition of a legal duty (compare, for example, *Trustees, Two Ocean Aquarium Trust v Kantey (Pty) Ltd* 2006 (3) SA 138 (SCA) para 10; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) paras 39 and 41, and *Minister of Safety and Security v Madyibi* 2010 (2) SA 356 (SCA) para 9.

[34] In *Van Duivenboden* above at para 27 it was remarked that:

> "Licences to possess firearms are not issued to enable the holders to shoot themselves or to shoot innocent persons who happen to be in the way ... nor do firearms belong in the hands of drunks. I have little doubt that the responsible police officers share that view...."

[35] These apposite remarks should apply with greater force where a holder of such a licence is a police officer. Those in police management should demand exacting standards from their officers in the use and handling of firearms. Anything less, resulting in harm to innocent citizens, is to be met with

indignation by members of the community, whose legal convictions dictate, in suitable circumstances, that liability should ensue. This is one such case.

[36] I therefore make the following order:

1. The defendant is ordered to pay the plaintiff's full proven or agreed damages suffered as a result of being shot by VS Selinda on 12 March 1999.
2. The defendant is ordered to pay the plaintiff's costs relating to the liability part of the case.
3. The determination of the plaintiff's damages is postponed *sine die.*

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE HEARD	**: 7 SEPTEMBER 2011**
JUDGMENT DELIVERED	**: 17 AUGUST 2012**
FOR THE PLAINTIFF	**: ADV GJ SCHEEPERS**
INSTRUCTED BY	**: DE OLIVEIRA SERRÃO ATTORNEYS, PRETORIA**
FOR THE DEFENDANT	**: ADV TWG BESTER**
INSTRUCTED BY	**: STATE ATTORNEY, PRETORIA**