

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5581/09

In the matter between:

BIANCA SANNA NGALO

Plaintiff

and

MINISTER OF SAFETY & SECURITY

Defendant

HEARD ON: 10 OCTOBER 2012

DELIVERED ON: 11 OCTOBER 2012

JUDGMENT

H M MUSI, JP

[1] This is a claim for damages arising out of a motor vehicle accident that occurred on the 10th December 2007 on the road between Luckhoff and Fauresmith. Ms Bianca Sanna Ngalo (the plaintiff) was then a passenger in a police motor vehicle, a bakkie with registration numbers BPD 882 B (the police bakkie), and there and then driven by constable Rasebonang. The bakkie had capsized as a result of which the plaintiff sustained injuries. Plaintiff is claiming an amount of R500 000,00 as compensation. It is not disputed that the

accident was due to the negligent driving of the driver of the police bakkie.

[2] The defendant is the Minister of Safety & Security who is cited in his capacity as the authority with responsibility over members of the South African Police Service and it is common cause that the driver of the police bakkie was acting in the course and within the scope of his employment in the South African Police Service.

[3] It is the plaintiff's case that the defendant is vicariously liable to compensate her for her injuries. The defendant disputes liability and, in particular, relies on the provisions of section 56 of the South African Service Act, No 68 of 1995. I shall revert to this defence in due course.

[4] The uncontested facts of the matter are that the plaintiff was due to attend a maintenance court on the 10th December 2007 at the magistrates' court Fauresmith, in which she was the complainant. In the morning of that day she went to the police station at Luckhoff and there she boarded the police bakkie. There were sixteen passengers at the back of the

bakkie and three at the front, including the driver. The passengers at the back were being transported to the court either at Fauresmith or Jagersfontein. The road to Jagersfontein goes past Fauresmith. The plaintiff's testimony is undisputed that the bakkie approached a curve at a high speed and as the driver was unable to negotiate the curve, he lost control and the bakkie capsized, injuring the plaintiff and others.

- [5] The dispute in the evidence centred on the plaintiff's evidence that she had been approached by two police officers from the Luckhoff police station on the Friday preceding the day of the accident. They had been to serve a summons requiring her to attend court on the 10th of December 2007. The plaintiff claimed that the police officers told her to report at the police station on the morning of the 10th so that she could be transported to the court. She named the two police officers as Madona and Thaele. This version was denied by the two police officers. Thaele knew the plaintiff's family well but said that he left the Luckhoff police station on 28 September 2007 when he was promoted and transferred to Petrusburg where he is station

commander holding the rank of captain. So he was no longer at Luckhoff in December 2007. Madona denied having ever served a summons on the plaintiff either in December or at any time. He went on to confirm Thaele's evidence that they had been detectives and had nothing to do with maintenance matters.

- [6] The plaintiff gave contradictory evidence. She initially testified that she had been told to report back at court on the 10th of December 2007 and that her father would also be warned to be present on that day. Subsequently she changed and claimed that she had not been given a date and heard of the date from the two police officers. She also testified that the summons was served on her on the 10th of December 2007, but under cross-examination changed this insisting that she had said that summons was served before the 10th of December 2007. Her counsel objected to the cross-examination on this point and insisted that she had in fact said that the summons was served before the 10th of December. The record of the proceedings clearly shows that she had contradicted herself in all these respects.

[7] It is clear to me that the plaintiff fabricated evidence in order to create the false impression that she had been a witness who was entitled to be transported in a police vehicle. In this regard, I accept the version of the two police officers who were credible witnesses and whose evidence disclosed no material contradictions whatsoever.

[8] There was also a dispute relating to a portion of the statement that the plaintiff made to warrant officer Taaibos, who investigated the accident in question. The relevant portion reads as follows:

“4. Ek het ‘n hike by hulle gevra en ek het my kind se onderhoud geld by die hof gaan gaal.”

The plaintiff denied having said this. Now I found warrant officer Taaibos to be a credible witness but I think that he may have misunderstood the plaintiff as to the nature of the maintenance claim. I say this because the plaintiff has given a full and credible explanation regarding this. In the view that I take of the matter, this dispute is of no consequence.

What is important is that the version of the plaintiff regarding what transpired from the moment she got to the police station in the morning of the 10th December 2007, is not contradicted by any other evidence. It may be noted in this regard that neither the driver of the bakkie nor the police station commander at the time was called to testify.

- [9] It is apposite to quote in full the provisions of section 56 of the South African Police Service Act:

“Whenever any person is conveyed in or makes use of any vehicle, aircraft or vessel, being the property or under the control of the State in the service, the State or any member shall not be liable to such person or his or her spouse, parents, child or other dependant for any loss or damage resulting from any bodily injury, loss of life or loss of or damage to property caused by or arising out of or in any way connected with the conveyance in or the use of such vehicle, aircraft or vessel, unless such person is so conveyed or makes use thereof in or in the interest of the performance of the functions of the State: provided that the provisions of this section shall not affect the liability of a member who wilfully causes the said loss or damage.”

[10] It appears to me that this case has to be decided upon the interpretation of the highlighted passage and the question is whether the plaintiff's conveyance was in the interest of the performance of the functions of the State.

[11] Counsel for both the plaintiff and defendant could not produce any authority on the point and, in particular, counsel for the defendant intimated that he researched the issue, but could find no authority. The closest authority that counsel for the plaintiff found, is the judgment in **NK v MINISTER OF SAFETY AND SECURITY** 2005 (6) SA 419 (CC). In this case three uniformed and on-duty police officers had given a lift to a young woman who had been stranded at night. Instead of taking her home the officers took her to a secluded spot where they raped her. The High Court found that the State was not liable for the conduct of the officers and this decision was confirmed on appeal by the Supreme Court of Appeal. The Constitutional Court ruled that the State was vicariously liable in the circumstances of the case.

[12] Counsel for the defendant argued that the above case is distinguishable from the instant case and submitted that the

plaintiff's conveyance could not have been in the interest of the performance of the functions of the State. He contended that the plaintiff's attendance at court was in her own interest as a claim for maintenance is in the nature of a civil claim not requiring the intervention of the State or police. He submitted that the plaintiff's claim should have been against the policeman who transported her in contravention of the law and police standing orders.

[13] I agree that the judgment in **NK v MINISTER OF SAFETY AND SECURITY**, *supra*, is, on the facts, distinguishable from the instant case. I, however, agree with counsel for the plaintiff that the judgment nonetheless provides valuable guidance in the adjudication of matters of this nature. The following passage is particularly instructive and it is apposite to reproduce the whole of paragraph 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 in 'sufficiently connected to the business of the employer to render the employer liable'."

The court further made it clear that the fact that the police officer's conduct in question is prohibited may not necessarily be an impediment to founding liability. It is noteworthy that *in casu*, unlike in the **NK**-case, the police officer was not pursuing his own interest outside the scope of his employment. He was duty bound to take to court some of the people he was conveying (eg an awaiting trial prisoner and state witnesses) and, as such, the policeman was advancing his master's business.

[14] In my view, the following factors compel the conclusion that the plaintiff's conveyance was in the interest of the performance of the functions of the State:

14.1 The court to which the plaintiff would ordinarily have gone for her maintenance claim was not functioning

and the people of Luckhoff had to travel a distance away to another town in order to access justice. This is an important consideration, for if the Luckhoff court was functioning, there could never have been any argument that the plaintiff would need to be transported thereto.

14.2 The right of access to court is a fundamental right enshrined in the Constitution (section 34) and the State has a responsibility to ensure that the citizens have access to the courts (section 165(4)). Provision of access to justice is one of the State's functions.

14.3 It was important that the people required to attend court are able to do so. This is in the interest of the administration of justice.

14.4 From the totality of the evidence on record it can be deduced that the plaintiff and her fellow passengers had difficulty travelling to Fauresmith at their expense and needed to be assisted. Sergeant Maduna, in particular, testified that ordinary people like the plaintiff travelling from Luckhoff to Fauresmith on their own would normally gather at a road crossing where they would hitchhike to Fauresmith. In these

circumstances, it is understandable why the police saw it fit to transport the people going to court. It is clear that Rasebonang was not on a frolic of his own in transporting the plaintiff and others.

14.5 It is clear from the plaintiff's uncontested evidence that only people going to court were transported and it is noteworthy that all had gathered at the police station from where they were transported. This is an indication that the police saw it as part of their responsibility to take them to court.

14.6 It is not difficult to imagine the negative impact on the administration of justice if people who are required to attend court failed to do so: the undue postponements and the time wasted as a result thereof as well as the resultant case backlogs. This will apply to all cases, including maintenance claims.

[15] I accordingly conclude that the defendant is vicariously liable to compensate the plaintiff for the injuries she sustained in the relevant accident.

[16] Regarding costs, the normal rule applies and costs must follow the cause. However, as counsel for the defendant pointed out, the trial did not proceed on the first day, being 29 November 2011, due to the fact that for some or other reason the plaintiff was not in a position to proceed on that day. Furthermore, the plaintiff brought an application for condonation of the late filing of a replication, which was granted unopposed. This replication was, in my view, wholly unnecessary and was not even canvassed during argument. The costs thereof must also be excluded and the same applies to the costs of the postponement of the 6th December 2011 when an interpreter could not be found.

[17] The following order is made:

- (a) The defendant is vicariously liable for the plaintiff's damages suffered as a result of the injuries she sustained in the accident that occurred on the 10th of December 2007. The quantum thereof is to be proved or agreed upon.
- (b) The defendant is to pay the costs of suit, but excluding the costs of the 29th of November 2011, 6th December 2011 and those relating to the plaintiff's replication.

H.M. MUSI, JP

On behalf of plaintiff:

Adv I T Dutton
Instructed by:
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On behalf of defendant:

Adv B S Mene
Instructed by:
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