

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION : MTHATHA**

CASE NO. 1548/07

In the matter between:

NTOMBENKOSI HLOMZA

Plaintiff

and

**THE MINISTER OF SAFETY AND
SECURITY**

1st Defendant

**THE STATION COMMISSIONER,
CENTRAL, MTHATHA**

2nd Defendant

JUDGMENT

GRIFFITHS, J.:

[1] This is an action for damages which has proceeded in a somewhat unusual manner and which may be described, for reasons which I shall set out hereinafter, as a "trial without a trial". The plaintiff has sued the

defendants, both in her personal capacity and in her representative capacity on behalf of her four minor children, for damages arising out of an incident which occurred on 13 February 2005 during which her husband and the father of the aforementioned minor children ("the deceased") shot the plaintiff in her upper jaw and neck whereafter he shot and killed himself with the same firearm.

[2] Based hereon the plaintiff has claimed under four separate heads, namely:

Claim A: Personal damages for herself arising from her having been shot by the deceased;

Claim B: Loss of support for the plaintiff personally as a consequence of the death of the deceased;

Claim C: Loss of support for the minor children as a consequence of the death of the deceased;

Claim D: Funeral expenses in respect of the death of the deceased.

[3] The matter was defended and ultimately came before me on trial. When the matter commenced Mr. Dukada who, with Mr. Hinana, appeared

for the plaintiff, informed me during the course of his opening address that the parties had agreed that the questions of liability and quantum of damages were to be separated. I accordingly ruled, pursuant to the provisions of rule 33(4), that liability would be dealt with separately from the question of damages. Mr. Dukada further indicated that in view of the various admissions which the defendants had made in their plea, he was of the view that no evidence was required on the part of the plaintiff as a *prima facie* case had been made out and the defendants ought to be put on their defence. The only "evidence" which was placed before me by consent was a certain provincial order (number 3 of 1998) which dealt with the regulation of possession of state owned firearms by members of the South African Police Service ("SAPS") when not on duty. Thereafter, Mr. Dukada closed the plaintiff's case.

[4] Mr. Mbenenge who, with Miss da Silva appeared for the defendant, thereafter indicated that the defendants likewise did not intend to lead any evidence and would be closing their case in turn. He further intimated that there were, in essence, two causes of action, the first being the action for personal injury to the plaintiff and the second being the action for loss of support of the plaintiff and the minor children as a consequence of the deceased having shot himself and thereby committing suicide. He further informed the court that the defendants conceded the personal injury claim of the plaintiff but that the claim for loss of support would be resisted on the basis that the plaintiff had not made out a case for such relief and that the admissions made by the defendants in their plea were not sufficient to support such a claim. Mr. Mbenenge thereafter closed the defendant's case and the matter proceeded to argument on this basis.

[5] It appears to have been common cause on the pleadings, or at the very least between the parties when the matter came to trial, that the deceased had at all material times been in possession of a police issue regulation firearm which he had in his possession whilst he was not on duty. It was also common cause that the plaintiff and the deceased were married. However, it was not admitted on the pleadings that the plaintiff and the deceased were the parents of the minor children. This aspect was not alluded to by Mr. Dukada in his opening address or during argument, nor was it dealt with by Mr. Mbenenge. In the minutes of the pretrial conference it was stated that each party had sought admissions from the other but that the defendants would not make any further admissions other than those contained in their plea. It appears therefore either that the parties were at *ad idem* that the sole issue between the parties was to be that which I shall refer to hereinafter or that these issues were to be stood over to be dealt with along with the question of quantum. In any event, because of the view that I take of the matter this aspect will become irrelevant.

[6] The admissions made on the pleadings which have relevance to the matter are therefore of importance. In this regard the defendant pleaded as follows:

"4.9 The Second Defendant and other policemen
had a legal duty;

4.9.1 to protect the Plaintiff from being
injured by the deceased.;

4.9.2 to take all reasonable steps to prevent the deceased from shooting the Plaintiff;

9. **Ad paragraphs 7 and 8**

9.1 The defendants admit only that-

9.1.1 the shooting of the plaintiff was caused by the negligent conduct of the second defendant and other members of the Service.

9.1.2 the negligent conduct consisted in the commission of acts and/or omissions set out in subparagraphs 7.1, 7.3, 7.4, 7.5, 7.7, 7.10, 7.11, 7.13, 7.16, 7.17, 7.18 and 7.19 of the paragraph under reply; and

9.1.3 members of the Service, including the second defendant, ought to have –

(a) foreseen the shooting of the plaintiff by the deceased; and

- (b) prevented the shooting by
seizing the firearm from the
possession of the deceased.

9.2 The rest of the allegations made herein are denied
and the plaintiff put to the proof thereof.”

[7] The relevant subparagraphs of paragraph 7 of the particulars of
claim which were admitted were as follows:

"

7.1 they failed to seize the official firearm from
possession of the deceased despite previous reports of
violence made by the Plaintiff to them against the
deceased;

7.2

7.3 they became aware that the deceased had
threatened to shoot the Plaintiff and/or manifested
threats of violence towards the Plaintiff but failed to
take steps to seize the official firearm from possession
of the deceased;

7.4 they allowed the deceased to continue possessing
the official firearm well knowing that the deceased was

unfit to possess it;

7.5 they failed to take measures to reassess the fitness of the deceased to possess an official firearm after having received reports of the deceased's acts of violence from the Plaintiff;

7.6 they allowed the deceased to be in possession of an official firearm even after working hours well knowing that the deceased had previously threatened to shoot the plaintiff;

7.7 they allowed the deceased to be in possession of an official firearm even after working hours well knowing that the deceased had adopted a violent attitude towards the plaintiff and was ill tempered;

7.8

7.9

7.10 they failed to institute a disciplinary inquiry against the deceased which would have rendered the deceased unfit to possess a firearm, especially when not on duty;

7.11 they failed to constitute a Firearms Committee in

terms of the provisions of Provincial Order 3/1998 upon receiving complaints of assault and pointing of a firearm from the plaintiff and threats of violence by the deceased;

7.12

7.13 they failed to report the violent conduct of the deceased towards the Plaintiff to higher authorities in the South African Police Service;

7.14

7.15

7.16 they failed to seize the official firearm from possession of the deceased well knowing that the Magistrate, Mthatha had granted a Protection Order against the deceased at the instance and in favour of the plaintiff;

7.17 they authorized or allowed the deceased to possess the official firearm when not on duty:

7.17.1 without having first investigated whether the deceased was fit to possess a firearm; and

7.17.2 without investigating whether the deceased was having a stable family life or not;

7.18 they granted the deceased permission to possess the official firearm or allowed him to possess it when not on official duty without the prescribed official procedures having first been complied with;

7.19 they failed to take measures to protect the Plaintiff from being injured by the deceased when they had means and ability to do so; and

7.20

7.21"

[8] Both Mr. Dukada and Mr. Mbenenge appeared to agree that the main issue to be decided was whether or not the admissions made by the defendants in their plea were sufficient to sustain a claim in delict as against the defendants for loss of support of the plaintiff and the minor children as a consequence of the deceased's suicide. Mr. Dukada argued that as the plaintiff's claim in this regard is based upon a failure or omission by the police to seize the official firearm from the deceased's possession after they had received reports of violent conduct relating to the deceased and as the defendants had admitted that the failure to remove the firearm from the deceased was an act of negligence, this was sufficient to found liability. This was especially so, he submitted, as all that the plaintiff needed to

establish was 1% negligence on the part of the servants of the first defendant. He further submitted that the plaintiff's case is not *per se* based on the suicide of the deceased as the suicide, so he submitted, was a consequence of the failure or omission by the police to seize the official firearm from the deceased after such reports of his violent conduct had been made to them.

[9] In addition to the foregoing, Mr. Dukada submitted that this matter is on all fours with the case of **Minister of Safety and Security and Another v Madyibi**¹. His argument was that because the facts were similar and because the appeal court has decided that in those circumstances the defendant ought to be visited with liability for loss of support of the dependents of a policeman who committed suicide with his service firearm in such circumstances, the above-mentioned admissions were sufficient to found such liability *in casu*, and there was no need for further evidence from the plaintiff. As I understand his submission, once negligence in the form of failure to remove a firearm from the policeman concerned under circumstances where there was a duty to do so is admitted, the defendants are liable for the consequences thereof. In essence, his submission amounts to this: accepting that the employees of the first defendant were negligent in failing to remove the firearm from the deceased, it follows that each and every action the deceased thereafter committed with the firearm which caused harm to another, must, *ipso facto*, be laid at the door of the defendants. I shall deal more fully with the Madyibi matter later in this judgment.

¹ 2010 (2) SA 356 (SCA)

[10] Mr. Dukada's submissions fail to take into account that there is a further aspect of the inquiry under the Aquilian action, that being whether or not the particular harm complained of is causally connected to the negligence admitted to by the defendants. The defendants have admitted negligence on the part of the police for failure to remove the firearm in circumstances where they had a duty to do so as a consequence of the complaints made by the plaintiff and the other factors admitted to, but specifically distanced themselves from any knowledge that the deceased might have had any form of suicidal tendency or that the police could have had any knowledge that he might have possessed such tendencies. All the admissions in this regard clearly relate to the claim for damages for personal injury to the plaintiff and not to the claim for loss of support which is a claim for pure economic loss. The concession by the defendants that they are liable for any damages that might arise from the plaintiff's personal injury claim is clearly only a concession that there is a causal link between any such damages and the failure of the police to remove the firearm. This does not amount to an admission that there is a causal link between such failure and the claim for loss of support and this still had to be established by the plaintiff.²

[11] When dealing with causation in the law of delict it is necessary to deal with two distinct problems. The first aspect is the question of factual causation and relates to the question as to whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim.³ The second aspect is whether or not the omission is linked to

² Van der Spuy v Minister of Correctional Services 2004 (2) SA 463 (SE) at 473 B - D

³ Minister of Police v Skosana 1977 (1) SA 31 (A) at 34

the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote. In the **Skosana case**, Corbett JA referred with approval to Professor Fleming, "**The Law of Torts**", fourth edition, p.169, in this regard as follows:

"The first involves what may broadly be called the 'factual' question whether the relation between the defendant's breach of duty and the plaintiff's injury is one of cause and effect in accordance with 'scientific' or 'objective' notions of physical sequence. If such a causal relation does not exist, that puts an end to the plaintiff's case, because no policy can be strong enough to warrant the imposition of liability for loss to which the defendant's conduct has not in fact contributed.

The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. There must be a reasonable connection between the harm threatened and the harm done. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. The task is to select those factors which are of sufficient significance to justify the imposition of liability and to draw a boundary along the line of consequences beyond which the injured party must

either shoulder the loss himself or seek reparation from another source."⁴

[12] The question of causation is complicated in the present matter by the fact that I have no evidence before me from which I can draw factual conclusions or inferences which may point to the existence of the necessary causal link as between the failure of the police to remove the firearm and the suicide of the deceased using the very same firearm. In this regard the court cannot have regard to facts not averred in the pleadings or raised in court in evidence, or by way of admission by counsel, as to do so would be a serious misdirection⁵. When an admission is made in a plea the fact so admitted is eliminated from the issues to be tried and the plaintiff is then relieved of the duty of bringing evidence to establish that particular fact⁶. To what extent can a court take into account admissions and/or inferences to be made therefrom in relation to an aspect which has in fact been denied? In my view the courts would be very loath, in the absence of evidence, to extend such admissions (and inferences therefrom) to form a basis for a finding that a fact denied by the defendant should be regarded as proven.

[13] In this regard it would be as well to repeat what the function and purpose of pleadings are. They are said to be threefold⁷:

"(a) They must ensure that both parties know what are the points of issue between them, so that each

4 See further: Van der Spuy v Minister of Correctional Services (supra) 471 - 477; International Shipping Company (PTY) Ltd. v Bentley 1990 (1) SA 680 (A) at 700E – 701C

5 Groenewald NO and Another v Swanepoel 2002 (6) SA 727 (E) at 727 A - B

6 Erasmus "Superior Court Practice" at page B1 - 144J and authorities there cited.

7 Beck's "Theory and Principles of Pleading in Civil Actions" (sixth edition) at pages 43 -- 44

party knows what case he has to meet. He or she can thus prepare for trial knowing what evidence he or she requires to support his own case and to meet that of his opponent. "The object of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial, attempt to canvass another."

(b) Pleadings are to assist the court by defining the limits of the action. However, in the absence of agreement between the parties the court may allow amendments at any stage of the proceedings.....

(c) Pleadings place the issues raised in the action on record so that when a judgment is given such judgment may be a bar to the parties litigating again on the same issues, enabling a party to raise a defence of res judicata if the other party attempts to raise the same issues."

[14] Turning then to the facts (insofar as they may be so regarded as I only have before me allegations which are admitted by the defendants) it is clear that the defendants, as stressed above, have steered clear from any admission which might, in any manner, be construed as an admission of any knowledge whatsoever on the part of the police that the deceased had any form of suicidal ideation or tendencies. The defendants have made it clear that the

admissions only extended to knowledge on the part of the police that the deceased had threatened the plaintiff with violence previously, including a threat to shoot her, that a protection order had been granted by a magistrate against the deceased in favour of the plaintiff and that, in these circumstances, the police had failed to follow the necessary procedures and duties available to them, and imposed upon them, and the various Acts such as the Police Act , the Firearms Protection Act et cetera. These, it will be seen, relate only to the potential injury to the plaintiff through the use of the firearm in question and not to anyone else and, in particular, not to the deceased himself.

[15] In these circumstances there is little doubt, and one can fully understand the concessions made by Mr. Mbenenge in this regard, that the defendants ought to have foreseen as a reasonable possibility that the deceased might have shot the plaintiff with the firearm. Clearly, both factual and legal causation exist in this regard in that, but for the omission of the police to remove the firearm from the deceased, such a shooting probably would not have occurred. In addition, as against the background painted by the aforesaid admissions by the defendants, in my view a reasonable man in the position of the police in this case would clearly have foreseen that such an eventuality was probable and likely to occur and would thus have taken steps to remove the firearm from the deceased. In these circumstances, there is little doubt that such an omission on the part of the police constituted an actionable wrong⁸.

⁸ See: Minister of Safety and Security v van Duivenboden 2002 (6) SA 431 (SCA); Van der Spuy v Minister of Correctional Services (supra); Minister of Safety and Security v Carmichelle 2004 (3) SA 305 (SCA); Minister of Safety and Security v Madyibi (supra).

[16] Can the same be said with regard to the suicide? In other words, can it be said that, on the factual admissions made by the defendants in this matter, a causal connection, both factual and legal, exists with regard to the actions of the deceased in using his police issue firearm in killing himself?

[17] As regards the question of factual causation, this relates to the question as to whether the negligent act in question (*in casu*, the failure by the police to remove the firearm from the deceased) caused or materially contributed to the harm (*in casu*, the deceased's suicide) giving rise to the claim (*in casu*, loss of support for the plaintiff and the minor children).

[18] In **Skosana's case** Corbett JA referred to **Prosser, Law of Torts, fourth edition, at 237** in this regard as follows⁹:

"A cause is a necessary antecedent: in a very real and practical sense, the term embraces all things which have so far contributed to the result that without them it would not have occurred. It covers not only positive acts and active physical forces, but also pre-existing passive conditions which have played a material part in bringing about the event. In particular it covers the defendant's omissions as well as his acts."

[19] Corbett JA proceeded to state the test for factual causation as follows;

" The test is thus whether but for the negligent act or

⁹ At page 35

omission of the defendant the event giving rise to the harm in question would have occurred. This test is otherwise known as that of the causa (conditio) sine qua non and I agree with my Brother VILJOEN that generally speaking (there may be exceptions - see Portswood v Svamvur, 1970 (4) SA 8 (RAD) at p. 14) no act, condition or omission can be regarded as a cause in fact unless it passes this test (see Da Silva and Another v Coutinho, 1971 (3) SA 123 (AD) at p. 147)."

[20] Applying this test to the present facts is made more difficult as a consequence of the fact that I have no evidence as to precisely how these events occurred, as to the deceased's general situation and otherwise. For example, it may well be that the evidence may have revealed that, notwithstanding the omission to remove the police issue firearm, the deceased may nonetheless have killed himself, for example, by the use of another firearm he may have had in his possession. Whilst this proposition may be criticized as being speculative, in my view it cannot be so as there is simply no evidence before me at all in this regard. There are only admissions of certain facts but no evidence of the general situation which prevailed in the plaintiff's and the deceased's household at the time. In van Duivenboden's case the submission was made that even if the police had removed the firearms in question from Brooks, he might nevertheless have shot the respondent in that case because he may have acquired another firearm in the given circumstances¹⁰. Nugent JA found that, on the evidence in that matter, that such questions were on the facts "questions that are so

¹⁰ At paragraphs 28 -- 29

speculative that they should be discounted from the inquiry". He made such a finding because the evidence in that matter clearly disclosed the unlikelihood, or improbability, of Brooks having acquired a separate firearm in that matter.

[21] In the present matter I do not believe that such a question is necessarily speculative. Had the parties placed facts before me by way of a stated case, or evidence, this decision would have been made somewhat easier. I am left to simply rely on admissions made by the defendant which the plaintiff claims are sufficient for me to make a finding that such factual causation exists. For all I know, the deceased may have been in possession of a second, or other, licensed (or even unlicensed) firearm upon which he could have called to kill himself had the police issue firearm been removed from him timeously.

[22] The only factor which militates against this line of reasoning is the fact that the defendant has admitted that, but for the omission on the part of the defendant to remove the firearm, the plaintiff herself would not have been shot. This being so, it seems that it must be inferred as a matter of probability that the deceased did not have available to him other firearms which he could have used to kill himself. However, it must be remembered that shooting the plaintiff and killing himself are two entirely different matters. Had he been bent on committing suicide, he could easily have done so without the use of this, or another firearm. He could, for instance, have cut his wrists or jumped off a high-rise building or employed another method of killing himself. It is for these reasons that I do not believe that, on the admissions before me, I can conclude that the test for factual

causation as postulated above can be decided in favour of the plaintiff.

[23] Even if I am wrong in this view, the plaintiff still has to establish the second leg of causation, namely legal causation. As stated by H. J. Erasmus J in the case of **Brooks v Minister of Safety and Security**¹¹:

" [41] The dependant's claim for loss of support is a claim for pure economic loss and, when dealing with the negligent causation of pure economic loss, it is well to remember that whereas physical injury to the person or property is prima facie unlawful, causing economic loss is not. One of the factors to be taken into consideration in determining the legal duty in regard to pure economic loss is whether the defendant knew or subjectively foresaw that his negligent conduct would cause damage to the plaintiff. Such foreseeability is often an important, even a decisive, factor in deciding whether wrongfulness has been established, but it is not in itself enough."

[24] It should also to be borne in mind that, whilst the general manner of its occurrence must be reasonably foreseeable, the precise or exact manner in which the harm occurs need not be foreseeable.¹²

[25] On the admissions made by the defendants, can it be said that such an

¹¹ 2008 (2) SA 397 (C) at paragraphs 41

¹² Van der Spuy v Minister of Correctional Services (supra) at 476

event as the suicide of the deceased was reasonably foreseeable? If it were, there is no doubt that such would constitute an actionable wrong. In this regard, as mentioned above, Mr. Dukada placed great reliance in argument on the appeal court judgments in the Madyibi and van Duivenboden cases. There are, however, two extremely important distinguishing factors between the facts of this case and the facts of those cases. The first is that evidence was led in those matters and the court was not left to rely simply on admissions. The second is that it is clear from the judgments in those matters that the police were aware that the deceased (in the Madyibe case) and Brooks (in the van Duivenboden case) had previously committed acts which, in the former case, indicated a suicidal tendency and in the latter case a tendency towards violence as against his wife and in general.

[26] With regard to the **Madyibi case**, a copy of the judgment of the Court of first instance was, by agreement, handed up to me. It is quite clear from that judgment that the evidence led before the court *a quo* in that matter revealed a litany of violence on the part of the deceased. Petse ADJP described this as follows:

"The foregoing is then a summary of the sorry tale and chilling account related by the plaintiff about her married life which demonstrates that plaintiff was, over the years, subjected to sustained physical and emotional abuse at the hands of the deceased."

[27] Furthermore, during the course of this history of abuse and violence, the deceased in that matter attempted to kill his wife by locking all the exit

doors in the house whilst both of them were inside, releasing highly inflammable gas from a gas cylinder and lighting a match. They were apparently rescued from certain death by the police.

[28] As may be seen, this is a far cry from the facts before me in the present matter. The limited admissions as set forth above cannot, by any stretch of the imagination, be equated with the evidence that was led in the Madyibe matter which clearly showed that the deceased in that matter had exhibited a history of sustained physical and emotional abuse, was generally violent and had demonstrated that his violent streak was not only focused on his wife. He had committed acts which, to the clear knowledge of the police, demonstrated his clear instability, a violent disposition and that he was quite capable of taking his own life.

[29] In the present matter I have the limited knowledge that the deceased exhibited a violent attitude towards the plaintiff, that he had threatened to shoot her, that there were complaints by her of assault and pointing of a firearm and that there was a protection order against the deceased in favour of the plaintiff. I have no knowledge as to the extent of the assaults and threats, how many times they occurred, over what period they occurred, what degree of violence accompanied such assaults and/threats etc. In particular, I have absolutely no evidence whatsoever as to the state of mind of the deceased and as to the degree of instability which accompanied these various assaults and threats. These, and various other factors, which almost certainly would have emerged during the course of evidence, are not present in this matter.

[30] This paucity of information coupled with the fact that the defendants have explicitly denied any knowledge whatsoever of any form of suicidal tendency on the part of the deceased or anything related thereto has placed me in a position where I find it extremely difficult to draw any conclusions with regard to the question of foreseeability, and whether or not a reasonable person in the position of the police would have foreseen the likelihood of the deceased committing suicide using the firearm which they ought to have removed from him.

[31] In these circumstances I am of the view that the plaintiff has not established both factual and legal causation with regard to the claims for loss of support and funeral expenses relating to the suicide of her husband, the deceased. Because the plaintiff has failed to produce sufficient evidence in this regard, I believe that the correct order with regard to these claims would be absolution from the instance.

[32] With regard to the question of costs, Mr. Mbenenge has submitted that this should be reserved for decision by the court ultimately hearing the question of quantum of damages. Mr. Dukada has submitted that costs ought to follow the result. I agree. The plaintiff has been substantially successful with regard to her claim for personal injuries and the extra costs (such as they might have been) with regard to the unsuccessful claims are likely to be unquantifiable and relatively small. In addition, it is common cause that the claim for personal injuries was only conceded on the morning of trial. The parties are agreed that costs of two counsel are warranted in this matter.

[33] The order which I make is accordingly as follows:

1. The defendants are ordered to compensate the plaintiff for any damages that she may prove to have suffered as a consequence of her having been shot by the deceased on 13 February 2005;
2. As regards claims B, C and D, the defendants are absolved from the instance;
3. The defendants are ordered to pay the plaintiff's costs, such costs to include the costs of two counsel.

JUDGE OF THE HIGH COURT

HEARD ON : 23 NOVEMBER 2010

DELIVERED ON : 20 JANUARY 2011

COUNSEL FOR PLAINTIFF : Mr Dukada Sc with

: Mr Hinana

INSTRUCTED BY : V. V. Msindo & Ass.

COUNSEL FOR DEFENDANTS

: Mr Mbenenge Sc with

: Ms Da Silva

INSTRUCTED BY

: State Attorney

: c/o Gwebindlala & Ass.