

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 1696/05

Delivered: 27/07/07

In the matter between:

CATHARINA PIETERSE

Plaintiff

And

**MINISTER LIASON & SAFETY IN THE
REPUBLIC OF SOUTH AFRICA**

1st Defendant

JOHN DENZEL ORANJE

2nd Defendant

JUDGMENT

Tlaletsi J:

Introduction

1. The plaintiff in this matter, Catharina Pieterse, is the wife of the late Andrew Kenneth Pieterse ("the deceased) who was fatally shot on 20 December 2002 on the Loeriesfontein road, in the district of Calvinia, by John Denzel Oranje, who was at the time a member of a Commando established as a part-time reserve component of the South African National Defence Force. The plaintiff has instituted an action for damages against the defendants for damages arising from the death of her deceased husband in her personal capacity as well as in her representative capacity as natural mother and guardian of her children, Clifford Andrew Pieterse, Christelle Audrey Pieterse and Avril Juanita Pieterse who were minors then.

2. In the process and before the trial of this matter commenced, two of the three children became majors and the particulars of claim were accordingly amended. I ordered, on the application by the parties, that the merits be separated and be determined first in terms of Rule 33(4) of the Uniform Rules of this court. The trial proceeded between the plaintiffs represented by Mr Coetzee, and the first defendant who is represented by Mr Motloun, assisted by Mr Mene.
3. I must point out that on the second day of the trial, it became obvious from the plaintiff's bundle that it contained a copy of a criminal judgment pertaining to this incident in which second defendant was charged for two counts of murder and in which I presided. I raised the issue whether I may now proceed with these proceedings in the light of my involvement in the criminal proceedings. Both counsel submitted that I should proceed with the trial since those proceedings are common cause and that the second defendant is not a party in these proceedings. Furthermore, they assured me that none of the witnesses who testified in the criminal trial will be called in these proceedings and that neither of the parties before me will be prejudiced by my presiding in these proceedings. Lastly, the parties are *ad idem* that the facts in this case are not in conflict with the factual findings made in the criminal trial. The factual findings are common cause. I therefore on the above grounds proceeded to conclude the proceedings.

The Pleadings

4. In the amended particulars of claim the plaintiffs based their case on the following causes of action. I will restrict these matters to the issue that I have to decide at this stage of the proceedings which only relate to negligence. The plaintiffs allege that at all relevant times the second defendant was in the employ of the first defendant and acted within the course and scope of his employment with the first defendant as a rifleman, alternatively:
 - 4.1 that the first defendant was at all times the owner of a 9mm Calibre Star Parabellum pistol with serial number B935475 and 14x9 mm rounds of ammunition and magazine issued to the second defendant by the first defendant; that the first defendant was aware that alternatively, should have been aware of the

danger of the firearm; that second defendant was not competent or qualified to handle the firearm with safety and that the first defendant was aware of such a fact, alternatively, ought to have been aware thereof and that first defendant allowed the second defendant to keep in his possession and control the said firearm outside his working hours;

4.2 that the first defendant expressly, alternatively tacitly consented to the second defendant using the firearm, alternatively, the first defendant with knowledge that the second defendant intentionally, alternatively, negligently may shoot, allowed that the second defendant keep the firearm in his possession and exercise control thereof;

4.3 that the first defendant, contrary to its policies and standing procedures, intentionally, alternatively, negligently allowed that the second defendant to, beyond official hours, alternatively service hours, to have full possession and control over the firearm.

4.4 that the first defendant accepted the risk consequent to the issuing of the firearm.

5. In the plea, the first defendant admits that the second defendant was a member of its Commando but denies any negligence on its part. It is specifically denied that the second defendant acted within the nature and scope of his employment with the first defendant during the incident in question, that the second defendant was authorized to use the firearm within the prescripts of the first defendant; that he was not authorized to intentionally or negligently, other than within the scope of his authorization, to use the firearm; that he was authorized to be in possession and control of the firearm outside of his official hours of duty. All in all the liability of the first defendant is denied. I preferred to refer to the particulars of claim as well as the plea to show which averments are common cause and those that will require to be proved.

6. For convenience, the bundles presented by the parties are referred to as the plaintiff's bundle and the defendant's bundle respectively. Counsel advised me that the bundles are accepted as the truth and do not have to be proved and that I can take notice of the contents thereof.

Oral Evidence Presented

7. The plaintiffs tendered the evidence of Leonard Eksteen Von Solms. He is a 66 year old retired captain in the South African Police Services from Cape Town. He moved to Calvinia in 1992 where he became attached to the Calvinia Commando holding the rank of major. He knew the second defendant as a rifleman in the Commando. According to his knowledge, it was not usual for the SANDF to issue 9mm pistols to riflemen, as it was mainly an officer's weapon. Therefore, he testified, riflemen are not normally trained in the use and handling of 9mm pistols. He personally received training for this weapon in the police services. He testified that he has no personal knowledge of the Standing Orders in the SANDF. He confirmed that he knew that the second defendant was issued with the 9mm parabellum pistol. He however does not know if a permit was issued to him.

8. According to him firearms were issued just before an operation to be undertaken. Operations included roadblocks and tracing of escaped prisoners. As in the SAPS, a person to be issued with a firearm had to be checked first if he was competent to handle the firearm. He does not know if same was done in the case of the second defendant. To check if a person was competent entailed ensuring that he is going to keep the weapon safe, that he is not a violent person and or that he does not have charges such as assault, robbery, etc. However, in the SANDF, unlike in the SAPS there was no place to check these records. One only had to do it himself. The difficulty was that they had no access to the SAP 69 (Criminal Record Centre). One could therefore not obtain a member's finger prints if such a member is not charged for a crime. As a result, he continued, it was not easy to pick up, unless you had knowledge, that a person was convicted of crime. He stated that one could make enquiries about a persons violent character from either friends, family members and colleagues. They themselves did not have access to personal files of members in the SANDF. Only commanders had such access.

9. Van Solms testified that he initiated that something be done to help the second defendant who was working directly under his command as an information gatherer. He told Col. Visagie that it be checked if he could be issued with a firearm. He accompanied Col. Visagie to Upington to see Col. Barnard. The two spoke about the details in his absence, as they were

the commanders. He was referred to a certificate at page 102 of the plaintiff's bundle which reads "Werksindeling... Geweerskitter" and said that it only proves that he was trained on a R4 Rifle and not a 9mm Parabellum. In his view, before a firearm is issued it has to be established that he is trained, and this information must be on his records and if it is not there, his view is that there was no official training.

- 10.** Under cross examination he confirmed that the reason why he saw the need for the second defendant to be issued with a firearm if possible, is because there were threats on his life related to his work as a Commando member. As his supervisor, he saw him having this firearm for at least 6 months prior to the incident. He however, never asked him if he had received training on the specific firearm. The second defendant's duties entailed obtaining information on organized crime syndicates which involved keeping surveillance on dangerous people. These people made death threats to himself, the second defendant as well as Col. Visagie. He was cross examined at length to show that the second defendant had training from when he was a permanent member of the SANDF on the use of different firearms including the 9mm pistol. It is not necessary to record this evidence as Counsel for the plaintiff indicated later during the first defendant's case that they do not dispute that he obtained training and that it is not the basis of their case that he was not trained on the specific firearm. Von Solms confirmed that he was not aware if the second defendant was at any stage declared unfit to possess a firearm. His evidence concluded the case for the plaintiffs.
- 11.** First Defendant tendered the evidence of Johannes Pietrus Visagie. He was the chief of the Calvinia Commando at the time and in charge of all the training and the activities of the Commando. He confirmed that the second defendant reported to Von Solms who in turn reported to him on all the activities of the Commando including operations. He was aware of threats on the lives of the members. Druglords and thieves once made direct threats to the second defendant that once he went through the Commando gate they will attack him. With the assistance of the police, a recorder was placed on his cellular phone (Visagi's) to record the telephone numbers of the callers for identification purposes. He confirmed that on the recommendation of Von Solms a firearm was issued to the second defendant after arrangements were made through his senior, Col. Banard from Upington. When he issued the firearm to second defendant,

he was satisfied that he had the necessary training as it was a rule. The requirements that he had to comply with were that a person must be a good and credible member of the Commando and that there was nothing funny or abnormal with him. His own findings were that the second defendant was a good, respectable and one of his best members of the Commando. Von Solms, he testified, also confirmed to him that he had no problem with him and further that he was a good Commando. He confirmed to him that there was nothing wrong with him that would prevent him from being issued with the weapon.

12. Visagie testified that he was obliged to issue a permit first before issuing a firearm. The second requirement was that a person must have a bolted safe, or have a safe available to him to store the firearm if it is not on his person. In this case a colleague, David Cupido, made his safe available to keep the firearm that was to be issued to the second defendant. At the time the second defendant was still in the process of buying a safe with the R180.00 he borrowed from Visagie. Before a firearm was issued the second defendant had to sign an undertaking document over the control and handling of the firearm. In this document, *inter alia*, the second defendant states that he has the necessary training on the weapon issued to him, that he has not been previously declared unfit to possess a weapon by a court of law and that he knows the safety features of the weapon. Apart from the undertakings and conditions contained in the document, he accepted that the weapon is issued to him on condition that the weapon and ammunition will be used for the purposes of official duties, necessity and during a necessary situation when properly on duty.

13. After receipt of the weapon, the second defendant had to report every Friday to present the weapon for inspection. The officer who inspected the weapon had to confirm by signing the permit. Visagie testified that the weapon had to be kept at all times in Cupido's safe, except when the second defendant was to participate in an official operation. He confirmed that on 20 December 2002 a big operation was arranged for Calvinia. Second defendant was given the weapon to participate in the operation. He was to keep an eye on the so-called targeted "drug lords". The operation was to start at 21H00 in and outside town. Second defendant was to keep observation at certain points in town as well as the movement of targeted people. He testified that after hearing about the shooting incident, he could not believe it because he did not expect it as according to him the second defendant had no problems. He

said the second defendant did not shoot the deceased in the name of the commando. He always believed that the weapon was safe in the possession of the second defendant. His evidence concluded the case for the first defendant.

14. The Parties' Contentions

- 14.1 Mr Coetzee contended, with regard to the main basis for the plaintiffs' claims that it is evident that the second defendant was acting within the course and scope of his employment in that he was issued with a firearm for the purposes of participating in the operation. That on the second defendant's evidence, he killed two people unlawfully when he was on duty of keeping observation as part of the operation and no evidence was placed on record by the first defendant to justify the killing of these people. He submitted that no evidence that excludes the application of the vicarious liability principle was presented by the first defendant.

- 14.2 As to the alternative leg for liability, Mr Coetzee submitted that the Commando was a support structure of the South African Police Services and it provided information on crime to the SAPS and were as such, part of the SAPS. He argued that by issuing a firearm to second defendant, first defendant as an organ of state had a legal duty to safeguard the public against violation of their rights in terms of Sec. 12(1) (c) of the ***Constitution Act 108 of 1996***, which provides that everyone has the right to freedom and security, which included the right to be free from all forms of violence from either public or private sources. He argued that second defendant was negligent by omission, in that steps were not taken to investigate whether second defendant was a proper person to be issued with a firearm.

15. Mr Motloung argued, *inter alia*, that it is not alleged in the particulars of claim that the firearm was issued negligently, that the evidence does not support a claim for vicarious liability and that the first defendant acted in terms of the standing orders applicable to issuing of firearms to employees.

Legal Framework and Analysis

16. In general terms, in a claim for patrimonial loss arising out of a delict, the plaintiff carries the onus to show that he or she suffered harm which was wrongfully and culpably caused by the defendant. See **Smit v Abrahams** 1992 (3) SA 158 (c) at 160; **The law of South Africa** (LAWSA) second edition Vol 8 Part 1 at p38. The particular grounds of negligence must be set out in detail in the particulars of claim (**Honikman v Alexandra Palace Hotels (Pty) Ltd 1962 (2) SA 404 (c) at 406-407 B**). In cases where reliance is based on duty of care, the particulars of claim must set out the facts that could or should have been foreseen by the defendant.

17. The plaintiff carries the onus to establish that a reasonable person in the position of the defendant would have foreseen the reasonable possibility of the act or omission injuring another person's property and resulting in that person's patrimonial loss, that the reasonable person would have taken reasonable steps to guard against such occurrence and that the defendant failed to take such reasonable steps. See: **Kruger v Coetzee 1966(2) SA 428 (A) at 430 E-F; Kruger v Carlton Paper of SA (Pty) Ltd 2002 (2) SA 335 (SCA) at 431 H-I; [2002] 2 all SA (A); Mister of safety and Security v Van Duivenboden 2002(6) SA 431 (SCA) at 448 E-F; [2002] 3 all SA 215 (A)**. The fact that harm is reasonably foreseeable does not necessarily mean that the defendant was required to act to prevent it occurring.

18. In cases of vicarious liability the legal position was laid as follows in **Messina Associated Carriers v Kleinhans** 2001(3) SA 868(SCA) at 872 F-J:

"It is trite law that an employer is liable for the delicts of an employee committed in the course and scope of the latter's employment. The rule is based on 'considerations of social policy' (per Corbett CJ in Mhlongo and Another NO v Minister of Police 1978 (2) SA 551 (A) at 567H). Its origin lies no doubt in the need to provide the victim of a delict with a defendant of substance able to pay damages. But even in the absence of an actual employer-employee relationship the law will permit the recovery of damages from one person for a delict committed by another where the relationship between them and the interest of the one in the

conduct of the other is such as to render the situation analogous to that of an employee acting in the course and scope of his or her employment or, as Watermeyer J put it in Van Blommenstein v Reynolds 1934 CPD 265 at 269, where 'in the eye of the law' the one was in the position of the other's servant. In such a situation one is really dealing with an analogous extension based on policy considerations of the employer's liability for the wrongful conduct of an employee. (See Boucher v Du Toit 1978 (3) SA 965 (O) at 972D - E.) Over the years the elements of the legal relationship between employer and employee and the interest of the one in the conduct of the other have been isolated in order to determine whether, in the absence of such a relationship, one person should, nonetheless, be held liable for a delict of another”.

19. In that instance the plaintiff carries the onus to allege and prove, in addition to the usual allegations to establish delictual liability, that the person who committed the delict was an employee of the defendant; that the employee performed the delictual act in the course and scope of her or his employment and what the employee's duties were at the relevant time. See: **Van der Berg v Coopers & Lybrand Trust (Pty)Ltd and Others** 2001 (2) SA 242 (SCA) at H-259D. The employer shall not be liable where the employee was engaged in a frolic of his or her own or doing something which was permitted to be done for his or her own purposes but not employed to do for the employer unless it was incidental to his or her employment. The situation, referred to as diviation cases, was considered in various decisions in which the test applicable was developed. See in this regard **Feldman (Pty) Ltd v Mall** 1945 AD 733 and **Minister of Police v Rabie** 1986(1)SA 117(A). In **K v Minister of Safety and Security** 2005 (6) SA 419 (CC) the court had to consider, *inter alia*, whether the common law position of vicarious liability need to be adapted or developed so as to be in line with the Constitution. The Court, per **O'Regan J**, summarized the position after considering the law on the subject in other jurisdictions as follows at p441 G-J.

“[44] From this comparative review, we can see that the test set in Rabie, with its focus both on the subjective state of mind of the employees and the objective question, whether the deviant conduct is nevertheless sufficiently connected to the employer's enterprise, is a test very similar to that employed in other jurisdictions. The objective element of the test which

relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. 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.”

The learned Judge held further that:

“[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.”

20. Reverting to the facts of this case I proceed to consider Mr Coetzee’s first submission, as the main leg of this case, that the second defendant was issued with a firearm for the purposes of being part of an operation; that the rest of the contingent was already at the base at the time and that there is no doubt that at that point in time the second defendant was on duty and was issued with a firearm for that purpose that is, to keep observation. He submitted that the evidence tendered by Visagie that second defendant was on duty should not be ignored despite the fact that it was introduced by the defendant. He argued that at the time the two people were shot, the second defendant was on duty and the defendant has not placed any evidence to justify the killing of the two people and as such the only inference to be drawn is that the first defendant is liable.
21. As I have already indicated, the first defendant has denied in the plea that the second defendant was at the time of the shooting acting within the course and scope of his employment. Visagie also testified that the second defendant did not shoot these people in the name of the Commando and was not employed to shoot the people. Both counsel

confirmed that I should take judicial notice of the judgement on the criminal trial. This judgement was filed as part of the plaintiff's Bundle. The only judgement that is also part of the plaintiff's bundle that Mr Coetzee submitted that I should ignore as it is not part of the evidence, but that he will rely on during argument is that of **Majiedt J** in **Suzette Irene Elmarie Nelson vs The Minister of Safety and Security and another**: Case No:1326/04 (unreported). He also apologized for having included the copy of this judgement in the bundle of the evidence. I am therefore, as Mr Motloun, submitted to consider the circumstances under which the deceased was killed.

22. The killing of the deceased had nothing to do with the activities of the Commando, the SANDF or SAPS. He was killed about 10 km out of Calvinia outside the road where he had parked his motor vehicle in which he was with one male and one female persons. The latter is a former girlfriend of the second defendant and they had two children. Second defendant had a suspicion that the two had a love relationship which he could not accept. The unlawfulness of this killing as the parties have placed on record, is accepted and not put in dispute. The question that should be answered is whether, the first defendant should be held vicariously liable for the actions of the second defendant under these circumstances.
23. From what I have said already, it is clear that the second defendant was issued with the firearm in order to protect himself against people who made threats on his life and for the purpose of the Command Operations. He was authorised to keep the firearm in his person and when not in need to keep it in Cupido's safe. It is also not in dispute that on the day of the incident he was supposed to report for duty where he was to keep observation and to report to the operation contingent. He deviated from his duties and went on a frolic of his own to settle what was his private matters. There is no evidence of any connection between his duties and the delict. The people killed were neither suspects nor people who posed any danger to his life. His subjective intention at the time was not to carry out his duties or act in the interests of his employer. Applying the test for vicarious liability and the deviation cases, the only reasonable conclusion is that the first defendant cannot be held liable.
24. The alternative cause of action relied upon by the plaintiffs has some

merit. There is a legal duty placed on all organs of the state to safeguard the public against violations of the Constitutional rights. Mr Coetzee argued that since the commander was gathering intelligence information for the benefit of the SAPS it must be regarded as part of the SAPS. By this analysis, Mr Coetzee submitted that the facts of this case are similar to the facts in **Van Duivenboden** case (*supra*) as well as the unreported case of this division in the **Nelson** case that I have referred to. In both these decisions the Minister of Safety and Security was found to be liable for the omission by its employees to hold an enquiry to determine the suitability of a person who caused harm, to possess a firearm. Mr Coetzee submitted that there was a duty placed on the first defendant to ensure that second defendant was a fit and proper person to be issued with a firearm. He submitted that a reasonable person in the position of Visagie would have gathered sufficient information to gather the relevant information.

25. The facts in **Van Duivenboden** and the **Nelson's** case are by far distinguishable from the facts of this case. In the **Duivenboden case**, plaintiff had instituted an action for damages for injuries he sustained when he was shot by one Brooks who was licensed to possess firearms. The respondent averred that the police acted negligently in failing to take steps to deprive him of his licenced firearms when there were sufficient grounds to do so by invoking the provisions of section 11 of the **Arms and Ammunition Act 75 of 1969**. The Court on Appeal accepted that long before the respondent was shot, various police officers were in possession of information that reflected upon Brooks fitness to be in possession of firearms which came from his wife and that other members of the police also had direct knowledge of other facts as a result of previous incidents. Brooks had, more than a year before respondent was shot, while he was in a drunken state, threatened to shoot himself and any person who attempted to intervene, including the police. The court held that his actions warranted him being declared unfit to possess a firearm after following the prescribed procedure.
26. In **Minister of Safety and Security v De Lima 2005 (5) SA 575** (SCA) in the court had to determine whether the police had been negligent in recommending that a firearm licence be issued to Dos Santos in circumstances where he had disclosed in his application for a firearm

licence that an assault criminal charge against him had been withdrawn. The court held at 580 G-I that:

“The essential question was not whether Dos Santos had been convicted of a crime. It was whether Dos Santos was a suitable person to possess a firearm and, in considering that question, the circumstances under which Dos Santos came to be charged, and the circumstances under which the charge came to be withdrawn, obviously required clarification.

So far as the charge is concerned, it was submitted on behalf of the appellant that Basson had acted reasonably inasmuch as only common assault was allegedly committed by Dos Santos. This argument misses the point. Of course a charge of, for example, murder would require more detailed enquiries. But the circumstances under which even a relatively minor assault was allegedly committed could very well indicate that the person concerned had a short temper, was easily provoked and quickly resorted to violence.”

27. In this case the circumstances under which the second applicant was issued with a firearm are different from the cases referred to above. In those instances the provisions of the **Arms and Ammunition Act 75 of 1969** were applicable. Furthermore, in both the **Van Duivendoden** and **Nelson** the court had to consider whether the omission on the part of the police officers to conduct an enquiry, under the **Arms and Ammunition Act 75 of 1969** to determine whether a person was fit to possess a firearm or to be issued with the firearm was negligent. The mere fact that the Commando was gathering information to be used by SAPS does not on its own suffice to regard second defendant as a member of SAPS. In the **De lima** case the issue related to failure to investigate facts disclosed which might influence the recommendation for the issuing of a firearm licence. In *casu*, the second defendant was issued with a firearm in terms of the provision of the SANDF Standing Orders. The provisions and requirements which are applicable in this SANDF have, according to first defendant been complied with. Visagie testified that threats to second defendant demanded that he be issued with a weapon to protect himself. Visagie when issuing the firearm satisfied himself that the second defendant had the necessary training to possess the firearm, he made arrangements for the firearm to be kept in Cupido's safe and that he possessed no information at the time that would make second defendant unfit to possess the firearm. The relevant section of the Standing Orders that had to be complied with provide that(only the Afrikaans text was

made available):

“4. Voorwardes vir die Uitreiking en Gebruik van Militere Vuurwapens

- a. Die bedreigingsbehoefte, na aanleiding van die operasionele waardering, bepaal of die uitreiking van ‘n militere wapen geregverdig word al dan nie.
- b. Die uitreiking van ‘n militere vuurwapen bly die prerogatief van die bevelvoerder.
- c. Besikbaarheid van voorraad, gekoppel aan die bedreigingsbehoefte, moet bepaal watter tipe vuurwapen, en in watter howveelhede uitgereik kan word.

5. Vaster Voorwaardes waaraan ‘n Lid moet Voldoen

- a. Die lid moet nie onbevoeg verklaar wees om ‘n vuurwapen te besit nie.
- b. die lid moet opleiding ontvang (het) in die hanteringsaspekte tov die spesifieke tipe wapen asook die wetlike aspekte tov die gebruik daarvan.
- c. Die lid moet bewys lewer van voorgeskrewe toesluitfasiliteite (Kyk SALO GS 4/53 dd 7 Jan 88) alvorens ‘n wapen uitgereik sal word.
- d. Persone wat itv wet 75 van 1964 deur ‘n hof ongeskik bevind is om ‘n vuurwapen te besit, mag nie met ‘n wapen uitgereik word nie.
- e. Vuurwapenpermit. ‘n Vuurwapenpermit moet ingevolge die bepalinge, prosedures en voorskrifte soos vervat in par 16 en 17 van SAW Voorraadvoorskrifte Log 1, vol A1, pamphlet 7 dd 1 Okt 85 uitgereik word. ‘n Lid wat die wapen aan sy person dra moet te alle tye in besit wees van die geldige permit vir die spesifieke vuurwapen en moet dit op aanvraag kan toon.

Vuurwapenpermitte moet jaarliks hernu word."

The relevant provisions relating to the withdrawal of the firearm are:

"VEREISTES VIR DIE TERUGNEEM VAN VUURWAPENS

7. Die volgende Vereistes vir die Terugneem van Vuurwapens geld:

- a. Indien enige een van die voorwaardes van uitreiking in par 4 of 5 nie meer aan voldoen word nie.*
- b. Waar enige (lid die wapen onverantwoordelik, of vir 'n ander doel as waarvoor die uitgereik is gebruik, bv jag, onregmatige dreig van persone, ens.*
- c. Waar 'n lid met sy militere vuurwapen deelneem aan enige vorm van para-militere aktiwiteit of in para- militere uniform betrokke is, al he thy nie sy militere vuurwapen gebruik of by hom gehad nie.*
- d. Waar die bedreiging in 'n spesifieke gebied so afgeneem het dat die Kommandement Bevelvoerder van mening is dat die heersende veiligheid situasie nie die uitreiking van vuurwapens vereis nie."*

- 28.** What should be understood from these provisions is that the Commanding Officer has the prerogative to decide whether a member should be issued with a firearm. The question that needs to be determined is whether Visagie as a Commando Officer properly exercised his prerogative. The fact that he has a prerogative in my view, presupposes that he has discretion. Such discretion should be exercised in compliance with the Standing Orders and relevant considerations.
- 29.** The question therefore is what a reasonable commander in the position of Visagie would have done in the exercise of his prerogative. Clause 5(a) states that a person should not be declared unfit to possess a firearm. Clause 5(d) states that the person should not have been declared unfit in terms of Act 75 of (1964) to possess a firearm by Court. Mr Coetzee

correctly pointed out that the legislation referred to is the incorrect one and does not relate to firearms.

- 30.** It is common cause that the issuing of the type of the firearm in issue was unusual to persons in the position of second defendant. Visagie also conceded that since this was a special dispensation, special procedures had to be followed. In this regard he testified that it is for this reason that he had to approach his senior, Col. Barnard for authority. Having obtained the authority it was left to him to exercise his prerogative. Visagie conceded under cross examination that he did not properly exercise his discretion to ensure that clauses 5(a) and 5(d) have been complied with. He also accepted that had he perhaps asked for security clearance or taken steps to check if second defendant had previous convictions, the position would have been different.
- 31.** It is common cause that the second defendant had previous convictions which included the following. Robbery in 1984, two counts of Assault in 1993, Assault in 1994, Malicious Damage to Property in 1998 and Assault in 1998. He conceded which I find appropriate, that had he known of these previous convictions, he would not have issued the firearm to him. He however, in re-examination stated that the dangerous situation of the second defendant would have in any case outweighed his previous record and justify the issuing of the firearm. This belated attempt to justify his conduct, fails to take into account the fact that he did not consider other alternatives to issuing a firearm. Von Solms in this regard, testified that had he been aware of the previous records of second defendant, he would not have allowed him to be considered for the issuing of a firearm. He would rather have relieved him of his duties in the Commando. This approach is more sensible as it would not put members of the public at the risk of being killed only to gather information on crime.
- 32.** Visagie had an opportunity to do an investigation once he became was aware that second defendant had been found guilty of riotous and violent conduct in the Commando by a disciplinary tribunal. The only excuse provided by Visagie for not taking this into account is that second defendant did not sign in the file to accept this conviction. Whether he signed for it or not is irrelevant. What is important is that the person who

he regarded as exemplary in the commando had this blemish in his record. This should have served as a signal to Visagie that all may not be gloomy with the second defendant as he thought. The fact that he had been convicted should have been investigated to determine whether he is fit to possess the firearm. I am mindful that one should be cautious against being influenced by the insidious subconscious influence of *ex-post facto* knowledge. First defendant had ample time to consider his decision which was not a split second decision.

- 33.** Since the weapon was issued to the second defendant in unusual circumstances, that is, not only for operational purposes but also to keep it for his protection, his position was analogous to that of an ordinary person issued with a firearm in terms of the firearm's legislation. In that instance, one would expect the officer clothed with the prerogative to be more cautious and careful. He has a duty to obtain all the necessary information regarding the character of the member, not only in the Commando but also in the community for him to properly exercise his prerogative and discretion.
- 34.** A reasonable man in the position of Visagie would have satisfied himself that second defendant was a competent person to be issued with a firearm and failure to do so is a negligent omission. Furthermore, a reasonable man in the position of Visagie with the knowledge that second defendant had a disciplinary conviction of riotous and violent conduct, would have foreseen that issuing a firearm under these circumstances and allowing the use thereof even after official hours to protect himself, creates a reasonable possibility of harm being caused and would have taken steps to guard against such foreseeable harm. Finally, Visagie conceded that a firearm is a dangerous weapon that may cause harm and that he is aware of the strict conditions laid down in the legislation controlling firearms. It is not a valid reason that he could not do an enquiry at the SAPS Criminal Record Centre if there was no criminal investigation conducted. The facility was available and no attempt was made to enquire on the criminal record of the second defendant. Relying only on his superficial knowledge of second defendant was not sufficient at all. In my view, there is a duty on the second defendant to ensure that when issuing weapons such as firearms to its members the public is not exposed to risk. Reasonable care should always be taken to ensure that members of the public are not

exposed to harm. Certainly in this case, the second defendant was not a fit and proper person to be issued with the firearm given his record of previous convictions in the Commando. The record says a lot about his temper.

- 35.** I therefore find that in the circumstances of this case the first defendant should be liable for the damages proved or agreed upon, arising out of the killing of the deceased in this matter. There is no reason why costs should not follow the results.

ORDER

In the result I make the following order:

- 1) The first defendant is ordered to pay to the plaintiffs such damages as they are able to prove arising out of the killing of the deceased.**
- 2) The first defendant is to pay the costs of this trial.**

**L P TLALETSI
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**