



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MTHATHA]**

CASE NO: 5724/2022

In the matter between:

NTUTHUZELO THINGA

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGMENT

HINANA AJ

1. INTRODUCTION

This is an application for default judgment against the defendant. Mr. Baceni appeared on behalf of the plaintiff and there was no appearance on behalf of the defendant.

2. THE FACTS

- 2.1 Summons in this matter were issued on 24 November 2022
- 2.2 The defendant served its notice to defend on 13 March 2023 and filed same on 10 January 2024.
- 2.3 The defendant's plea was served on the plaintiff's attorneys on 04 August 2023.
- 2.4 On 12 November 2024, the defendant's defence was struck out with an order to pay costs of the application.
- 2.5 The application for trial date was made on 21 January 2025 and same was served on 27 January 2025.
- 2.6 It is common cause that the defendant has not instituted any interlocutory application for the re-instatement of the defence. Neither is there any indication that there is an outstanding application for rescission of the order that struck out the defence.

3. THE PLEADINGS

- 3.1 The plaintiff, Mr. Ntuthuzelo Thinga is an adult unemployed male suing the defendant in his personal capacity.
- 3.2 The Minister of Police is cited as follows:-

3.2.1 *"The Minister of Police*

3.2.2 *Is statutory and vicariously liable for the wrongful conduct of the members of the South African Police Service (the police) where such*

conduct is performed and/or arises when the police were executing and exercising their official duties with the defendant.

3.2.3 The conduct sought to be impugned in these proceedings was performed by the police and were discharging and/or performing their official duties with the defendant, and

3.2.4 Therefore, the defendant has a direct and substantial interest as these proceedings”

3.3 The plaintiff further avers that on 06th day of September 2022 at or near Stanford Terrace Street in the district of Mthatha, he was arrested in front of a crowd of people and was subsequently detained at Central Police Station by one Mr. Mtwana and other members of the South African Police Service whose full and further particulars are unknown to the plaintiff.

3.4 The plaintiff's detention lasted for (9) nine days as he was released on bail on 15 September 2022.

3.5 According to the plaintiff, the defendant is also liable for past court appearance which took place from 08 September 2022 to 15 September 2022.

3.6 As a result of the plaintiff's arrest, the plaintiff suffered damages in the amount of R900 000.00 and there are other ancillary relief sought.

3.7 In his particulars of claim a globular amount of R900 000.00 is claimed which he contends to be reasonable and fair.

4. THE EVIDENCE

- 4.1 The plaintiff gave evidence in support of his claim against the defendant. He stated that
- 4.1.1 On 6 September 2022, he got out of his house to fetch his kids. At about 10H00, he again took another group of kids. He then saw a white polo and the occupants of the white polo came straight to him. He was handcuffed and when he asked for the reasons, he was told that a young man had complained that he (the plaintiff) had shot him. He immediately proclaimed his innocence and even requested the people who were arresting him to contact his brother so as to investigate the whereabouts of the tracker of the car he was driving. His request fell on deaf ears.
- 4.2 He was taken to Central Police Station and at no stage was he shown an arrest warrant. At Central Police Station, he was taken behind the counter and handcuffs were removed. His fingerprints were taken between 15H00 and 16H00
- 4.3 After fingerprints were taken, he was taken to the cells and the condition of the cells were inhumane. There were about 30-40 people in the cells.
- 4.4 He appeared in court on 07 September 2022 and his case was postponed to 15 September 2022 in custody.
- 4.5 On 15 September 2022, before the court resumed, he met the prosecutor who asked him what had happened. After explaining, the prosecutor told him to go as the person who had laid charges against him entered the office. He was shown the video footage and the prosecutor said it was not the plaintiff who was on the video footage. As a result, the prosecutor told the plaintiff that he was not guilty of any offence.

5. THE LAW

- 5.1 The employer may be held liable for the wrongful conduct of his employee in terms of the principles of vicarious liability. In **Mkhize v Martens**¹ the following was stated: -

“....a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes and outside of his authority, is not in the course of his employment, even though it may have been done during his employment.”²

- 5.2 For decades, the law on various liability developed and in my view, this is settled law³.

- 5.3 There were two tests set out in the matter of **Rabie**⁴ and the court formulated the tests as follows: -

“It seems clear that an act by a servant solely for his own interest and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act of the servant does so fall, some reference is to be made to the servant’s intention. The test in this regard is subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant’s act for his own interests and purposes, and the business of his master, the master may yet be liable. This is on objective test”

¹ 1914 AD 382

² At para 319

³ Minister of Police v Rabie 1986 (1) SA 117 (A), K v Minister of Safety and Security 2005 (3) SA 179 (SCA), F v Minister of Safety and Security 2012 (1) SA 536 (CC).

⁴ See footnote 3 above

- 5.4 Neethling⁵ *et al* provided an introduction on vicarious liability and said the following: -

“Vicarious liability may in general terms be described as the strict liability of one person for the delict of another. The former is thus indirectly or vicariously liable for the damage caused by the latter. This liability applies where there is a particular relationship between two persons....”

- 5.5 The onus is on the plaintiff to allege and prove that the employee committed the delict whilst acting within the course and authority of his employment as a servant of the respondent. In doing so, the plaintiff must allege and prove that

5.5.1 The employee who committed the delict was an employee of the defendant⁶,

5.5.2 The scope of the employee’s duties at the time of the commission of delict⁷.

5.5.3 That the employee performed the delictual act in the course and scope of the employee’s employment⁸.

6. ANALYSIS OF THE EVIDENCE AND PLEADINGS

- 6.1 In my view, the onus is on the plaintiff to prove on a balance of probabilities that the master is vicariously liable for the wrongs committed

⁵ Neethling, Potgieter and Visser, *The Law of Delict*, 5th edition. See also Jonathan Burchell, *Principles of Delict* at p 215

⁶ *Gibbins v Williams, Muller, Wright and Mostert* 1987 (2) SA 82 (T).

⁷ *Minister of Police v Mbilini* 1983 (3) SA 705 (A), *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA), *Minister of Safety and Security v F* 2011 (3) SA 487.

⁸ *Masuku v Mdlalose* 1998 (1) SA 1 (SCA), *Stadsraad van Pretoria v Pretoria Pools* 1990 (1) SA 1005 (T), *Midway Two Engineering & Construction Services BK v Transvaal BpK* 1998 (3) SA 17 (SCA) p 29.

by his employee whilst the employee was acting within the course and authority of his employment as a servant of his master.

6.2 In this matter, the plaintiff did not allege any averment regarding the liability of the Minister of Police as a result of wrongful actions of the members of the South African Police while acting within the course and authority as servants of the Minister of Police.

6.3 In terms of Rule 9 *“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim....”*

6.4 In my view, the plaintiff has not complied with this rule in so far as it relates to pleading vicarious liability of the defendant.

6.5 This court invited Mr. Baceni to make submissions regarding the lack of the necessary averment to allege vicarious liability. He submitted that this may be led in evidence. I do not agree with this submission. It is the duty of the plaintiff to prove and allege that the employer is vicariously liable.

7. Absent that averment, I cannot find in favor of the plaintiff.

8. In view of the position I take, I need not deal with the *quantum* of damages.

9. CONCLUSION AND ORDER

9.1 I have made a finding that the particulars of claim lack a necessary averment to hold the Minister of Police vicariously liable for the delictual actions committed by his employees while acting within their course and authority as servants of the Minister of Police.

9.2 Accordingly, the plaintiff has failed to this regard and the following order is made: -

9.2.1 The application for default judgment is refused.

9.2.2 The plaintiff is granted leave, if so advised, to amend his particulars of claim.

9.2.3 There shall be no order as to costs.

M N Hinana
Acting judge of the High Court

Appearances: -

Mr. Baceni, Counsel for the plaintiff

No appearance for the defendant

Instructed by:

S Zangqa Inc.

Unit 1 Glencombe Flats

No 45 Leeds Road

MTHATHA

Ref Mr. Zangqa

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