

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

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

11/12/2025

DATE

SIGNATURE

CASE NO: 28517/2018

In the matter between:

M..... C.....H.....

obo herself and minor child, R.....H.....

First Applicant

CAPTAIN R.....H.....H.....

Second Applicant

And

MINISTER OF POLICE

First Respondent

UNKNOWN POLICE OFFICER

Second Respondent

JUDGMENT

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

BEFORE THE HONOURABLE JUDGE, MATJELE AJ

Introduction

1. This is an application for default judgment, which was scheduled to be heard on the unopposed motion roll of the 8th May 2025, for the Court to determine both merits and quantum where the Minister of Police is being sued for vicarious liability for actions of its employee (Emmanuel) for killing his wife with a service fire-arm.
2. It is common cause that Emmanuel was convicted and sentenced. He was still serving his imprisonment sentence at the time of the hearing of this matter. The minister is sued by the deceased wife's minor daughter and her both parents, one also representing the minor child.
3. It is also clear that Emmanuel was originally the second defendant in the matter, and the claim against him was abandoned or withdrawn by the plaintiffs or applicants herein, for reasons best known to them.
4. On the day of hearing this matter it became clear that though it would ordinarily be unopposed as a default judgment application, the 1st Defendant's counsel was present in court, for purposes of "cross examining the plaintiff's witnesses", as the applicants present evidence to prove liability and quantum in their unliquidated delictual claim.

5. In addition, Respondent's (defendant's) counsel had insisted on additional specific witnesses to be called by the Applicants for him to cross-examine them. However, in exercising this right the struck off defence would not be put to the witnesses.

State's duty to comply with Court orders.

6. This application for default judgement arises from the Respondents failure to comply with the Court Order of Van Der Merwe AJ, dated 15 December 2022. The respondent's defence was struck out as per Court Order of the Honourable Malengana AJ, dated 03 May 2023. A rescission application brought by the respondent / defendant was dismissed by the Honourable Hertzog AJ on the 05 March 2024, hence this matter is unopposed.
7. Section 165 (4) and (5) of the Constitution of South Africa (the constitution) is clear that state institutions and agencies have a paramount duty to assist and protect the courts and ensure their effectiveness, among others. In addition, the orders by courts are binding equally on all persons, including the very organs of the state. In **Motswagae**¹, the Constitutional Court stated that *"...there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and must do it properly."*

¹ Motswagae and Others v Rustenburg Local Municipality and Another [2013] ZACC 1; 2013 (2) SA 613 (CC).

8. And in **Ndabeni**, the Constitutional Court stated that *“If the impression were to be created that court orders are not binding, or can be flouted with impunity, the future of the judiciary, and the rule of law, would indeed be bleak.”*²

Defendant’s right to cross-examine plaintiff’s witnesses where its defence was struck off.

9. Due to the number of witnesses needed, the matter could not be dealt with on the unopposed motion roll of the said day, with the applicants’ counsel insisting that there is no other court roll the matter may be accommodated as a default judgment application, except this roll. The registrar would not, he further argued, allocate it on the opposed motion roll, as it technically was, or any other roll except the very unopposed roll as per the practice directives.
10. He cited the prejudice to be suffered by the applicants if the matter is removed from the roll, in the process of further delays occurring. The matter had to be postponed to the 16th July 2025, during recess period for plaintiff’s evidence to be heard. The matter ended up rolled over to the 17th July 2025. Heads of argument were then filed on the 21st July 2025. This situation is clearly incongruent and inconsistent with what is anticipated in unopposed motion court roll. It is contrary to what practice directive 9.14 of the Gauteng Local Division of the High Court anticipated when default judgments were allocated on the unopposed motion court roll of about 50 matters per day. **It ran for two to three days like a trial.**

² Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni [2022] ZACC 3. See also Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) (State Capture) at para 87.

11. It is the Court that raised the concern and even requested to be addressed on this aspect at the close of proceedings, considering the above problem it causes. It is a glaringly inevitable procedural dilemma, which caused of a matter meant to be heard within minutes or few hours, ending up heard over two days. It is noteworthy '*in casu*' that the plaintiffs had no problem with the defendants' participation in the matter.

12. The question to be answered is: 'what is the 'locus standi' of a defendant whose defence has been struck out, and to what extent he may still participate in the legal proceedings, if at all?'

13. In simple terms, ordinarily once a defendant's defence in its plea is struck out, as in the present case, it means that there is no defence before the court by which the defendant answers to, or denies the plaintiff's cause of action, hence the plaintiff is allowed to proceed to obtain judgment by default. In liquidated claims there is no much problem. However, in unliquidated claims there is clearly a necessity to call witnesses, especially to prove quantum of damages. The latter scenario is what prevailed on the issue at hand.

14. I questioned the presence of the defendant's counsel during these proceedings. I questioned the authenticity of, and preferential treatment, of the Defendants in this matter, where their defence has been struck off due to their failure to comply with this Court's orders. More so, of great concern is the fact that the very errant defendant's counsel is given a right to demand which witnesses, especially experts, to be called for him/her to exercise this 'right to cross-examine' he/she enjoys. The exercise of this very 'right' is what has led to the hearing of evidence

over 3 days, instead of within few hours, at most, hence on unopposed motion roll.

Principles:

15. The old position was always that *“If a defence is struck out, the defendant cannot appear at the trial and cross-examine the plaintiff’s witnesses”*³. This was followed in *Minister of Safety and Security v Burger*⁴ by Tlhapi J who rejected the argument that the striking of a defence left room for the [defendant] to still participate in the trial as far as the determination of quantum is concerned.

16. A contrary view is expressed in *Stevens*⁵ by Twala J who stated that [11]: “... the striking out of the defence of the defendant does not in itself bar the defendant from participating in these proceedings. The defendant is entitled to participate in these proceedings but his participation is restricted in the sense that it cannot raise the defence that has been struck out by an order of court. It is therefore not correct to say the defendant was not entitled to cross-examine the plaintiffs after giving evidence, furthermore, the cross-examination was on the evidence tendered by the plaintiffs and the defendant did not attempt to introduce its own case during the cross-examination”. This view is supported by several recent judgments like *RAF (Motala)*⁶ by Hitchings AJ, *Minister of Police v Michillies*,⁷ and *T.P.R. obo P.M.M. v RAF*⁸ by Davis J.

³ Herbstein and Van Winsen : The Civil Practice of the High Courts of South Africa, 5th Ed at para 824.

⁴ 3 (59473) [2015] ZAGPPHC 346 (15 May 2015) (Burger).

⁵ *Stevens and Another v RAF* op cit at para 11.

⁶ *Motala NO v RAF* (42353/2019) [2023] ZAGPJHC 1323 (15 November 2023) (Motala).

⁷ *Minister of Police v Michillies* (1011/2022) [2023] ZANWHC 90 22 June 2023 (Michillies).

⁸ *T.P.R. obo P.M.M. v RAF* (9117/2019) ZAGPPHC (18 April 2024) (TPR).

17. Davis J in TPR examined the above cases and ‘old authorities’ postulating the contrary position. He concluded that all the “old authorities” which had been cited in his case predated the Constitution, and yet section 34 of the Constitution guarantees “everyone ... a right to have a dispute that can be resolved by the application of law decided in a fair hearing before a court”. Relying on Mukkadam⁹ where the Constitutional Court confirmed that the manner in which a party brings a dispute before a court may be regulated, in this instance by the Superior Courts Act 10 of 2013 and the Uniform Rules.¹⁰

18. The other strong justification appearing in the above matters is the potential depletion of the public purse. Usually, after the defendant’s case has been struck out, there would be amendments to pleadings increasing the claims. However, even where no such amendment is sought by the plaintiff, like ‘*in casu*’, the defendant is still justifiable to be present in the proceedings and to cross-examine the defendants. Essentially, the recent cases are addressing the mischief and/or potential mischief of inflated claims at default judgment applications. It is also for the Defendant to be present to ensure that the plaintiff has indeed discharged the onus of proving its case, and to test plaintiff’s evidence (especially experts) when proving its quantum to the court.

19. In para 18, Davis J concludes, which I now concur with: “I find that when a defendant’s defence has been struck out, a plaintiff still has to prove its entitlement to damages and the extent thereof and a defendant has the right to cross-examine the plaintiff’s witnesses or to interrogate their affidavits (and

⁹ Mukaddam v Pioneer Foods (Pty) Ltd 2013 (5) SA 89 (CC) per Jafta J at par [31].

¹⁰ See: Mukaddam supra, at par [31].

reports) if they have been allowed by a court in terms of Rule 38(2) on condition further that the defendant may not put a different factual version to such witnesses, lead countervailing evidence or base any argument on facts not put in evidence by the plaintiff.”¹¹

In which roll should these matters be allocated?

20. In light of my conclusion that the Defendant / Respondent is entitled to cross-examine the plaintiff’s witnesses, the problem of matters running beyond the allocated or anticipated time frame remains a challenge, with these matter allocated in unopposed motion rolls. Due to the usual backlog in securing closer trial dates, ordinarily, allocating these matters on the trial roll would be an injustice running against the spirit and purport of uniform rule 31(2)(a) intended to provide speedy relief.

21. Ordinarily, when a matter is called in court, and a legal practitioner representing the other side rises, the matter is regarded as opposed, and therefore belongs to the opposed motion court roll. In this case, I was tempted to deal with it in the same manner. However, the plaintiff’s attorney argued that if the matter in not proceeded with, there in no other roll it may be allocated in by the Registrar. And this is prejudicial to their clients’ interests.

22. From the words of Twala J in Stevens (supra), “...*the rules are for the court and not the court for the rules*”¹². Therefore, these matters should either be allocated in a special default judgments roll, with the Judge President’s blessing,

¹¹ T.P.R op–cit at para 18.

¹² At para 11.

alternatively, on opposed motion roll, where viva voce evidence may be heard and tested by the defendant's counsel, under cross-examination, thus avoiding the inconvenience and undesirability of dealing with an unopposed motion roll matter over two or more days, as was the case *in casu*.

Merits of the case:

23. Three witnesses were called, namely the applicants, Captain Raymond Hosani Hobyani and Monica Cebisile Hobyani (both parents of the deceased), and the social worker, Muzi Happyness Mandlazi. The police docket and its contents were accepted as Exhibit A. In addition, the actuarial report compiled by Mr. Ndumiso Mavimbela of Manala Actuaries and Consultants, was accepted as exhibit B.

24. While sleeping in their home in Protea Glen, Soweto, in the early hours of the 29th January 2018, the applicants received a telephone call from a neighbour of their daughter, Wisani Brenda Hobyani (the deceased) and her husband, known as Emmanuel, in Randfontein. She was informing them that there had been gun shots in the deceased's home, and the deceased was missing in the house. They rushed there.

25. Upon their arrival they found an already cordoned off scene with a pool of blood in the bathroom and at the front main door of the house. The police were already there. The husband, Emmanuel Rabelani Mankhili (Emmanuel), had taken the deceased to a mine dump between Kagiso and Randfontein, where the police found the deceased's body. The first applicant, the deceased's father, had to go there to confirm if that's her daughter's body, which devastated him, especially due to the condition in which his daughter's body was found, about a kilometre

off the main road into a mining dump, with a bullet wound on the forehead and a thorax that was slit open. There were about five bullets wounds on the deceased's body.

26. According to Mr Hobyani when he enquired from an IPID investigator he was told that Emmanuel was on duty around 7pm in the Randfontein tactical response team in Randfontein, though reporting in Kagiso where they both worked. This means he was on duty that night, per RHH. It is unknown why he was at their house in the early hours of that morning of the 29th January 2018.

27. The deceased's daughter was found in the home of one of the neighbours shaking, and not even dressed warm. Apparently, the neighbours heard her crying at their door after they heard gun shots, and later seeing Emmanuel's Ford Ranger vehicle speeding off the complex. They thought he was rushing her to hospital as they on found blood in the house, and could not find the deceased. According to the evidence of both applicants, the child had witnessed the killing of her mother, at that tender age of three (3) years, as she would mimic the sound of a gun when talking about his father, that "Rabie 'tu-tu-tu' Wisani" (the deceased mother). This she would say even when they drive and she sees any Toyota Yaris, as the deceased drove one.

28. The impact this death and what both the applicants and the child witnessed was still evident in court as they individually testified. The court had to adjourn to allow them finish crying, and recompose for continuation of their individual evidence, individually. They were referred to a professional social worker, Mr. Muzi

Happyness Mandlazi, by their attorney, Mr. Makhubela, where they were diagnosed with and treated for Post-Traumatic Stress (PTS).

29. MCH stated that prior to the incident the child was used to them. From birth as the deceased was taken care of by her after the birth of the child, till she returned to work after 6 months. As she worked 4 days in and 4 days off, they stayed with the child on all days she was on duty, till the child was 2 years of age, and began attending creche. Even then she would be with them over the weekends when the mother was on duty.

30. They described the child as free-spirited, not afraid of people and would interact well even with strangers visiting their home. However, after the incident, from the very day she narrated to her aunt who had flown from Cape Town, when she accompanied her to the bathroom that her father “qush qush, Wisani” (mimicking gun sound). And she would frequently ask where her mom was, and they would tell her she is at work, until she was mature where they would take her to her mother’s grave. She is now in grade 5, and 11 years old. Unlike in the past, she now avoids people and is withdrawn, even from their other grandchildren. She would rather be alone in the bedroom playing with her cell phone than with other kids. She would get irritated quickly, and even burst into tears when adults speak with her sternly. She also mumbles things talking to herself when she is alone.

31. In terms of the expert social worker, Mr. Mandlazi, who confirmed receiving a referral of the whole family from their attorney. He had five sessions with them, especially more with the child. He discovered that there was trauma in the family and the child, with manifestation of anger. The child indicated, in a separate interview with her, that she wished she had a gun so she could shoot somebody.

She even displayed suicidal disposition, which called for immediate attention, hence he then applied necessary psychological trauma interventions to address PTS. The therapy is ongoing, where she needs a session per month every twelve months, according to her stages of development.

32. In respect of the deceased's parents, he diagnosed them with emotional trauma, shock, anger and coping difficulties. They asked themselves a lot of questions. MCH ended taking medication which incapacitated her from running the tuckshop as she used to prior to the incident. In respect of RHH, who was a police Captain ended up resigning, finding it difficult to wear uniform and carry a gun in front of their granddaughter. They now survive on RHH's pension income.

33. Actuarial report compiled by Mr. Ndumiso Mavimbela of Manala Actuaries and Consultants, exhibit B herein provides for the following:

Issues:

34. It is not in dispute that:

- a. The 1st and 2nd Applicants, and plaintiffs in the main case, are the parents of the deceased, a mother of their grandchild, who is also a claimant in the matter.
- b. The deceased was killed by her husband, the unidentified second defendant in the matter, only referred to as Emmanuel.
- c. Both Emmanuel and the Deceased were police officers employed by the 1st Respondent (1st Defendant).
- d. Prior to the deceased being killed, both had been dispossessed of their fire-arms due to allegations of domestic violence between them as a married couple.

- e. The said dispossessed guns were later given back to each party.

35. What is disputed is:

- a. Whether the 1st Respondent is vicariously liable for the actions of the police official, Emmanuel?
- b. If the 1st Respondent is liable, what is the justifiable quantum in respect of each applicant?

Law

36. From the cases relevant, one closer to the matter in casu is the case of Mathibela,¹³ where the issue to be determined in the merits, was the question of liability only, as to “...whether the defendant can be held vicariously liable for the actions of Sebiloane (a police reservist), in shooting the plaintiff (a girlfriend): (i) at a private function; (ii) when he was not in uniform; (iii) travelling in his own motor vehicle; (iv) not on duty; (v) pursuing his own interest (on his own frolic); (vi) having deviated from the generally accepted norm.”¹⁴

37. If one follows the arguments of the Respondent’s counsel in our matter, he paints almost the same the picture as in Mathibela, where a policeman shot his own partner, within the privacy of her home. Sebiloane was not authorised to carry firearm off duty, his seniors omitted to ensure he surrendered the firearm before going home. Also, there was evidence that he had internally been previously disciplined for discharge of firearm and yet the defendant did not ensure that he

¹³ In Mathibela v The Minister of Police 2020 JDR 0157 (GP) 2020.

¹⁴ Mathibela supra at para 2.

underwent psychological debriefing, as required. Mavundla J held that the Minister is liable. However on appeal, Burger AJ and Mazibuko AJ overturned this decision, while a minority decision of Makgoba J agreed with the court '*a quo*'.¹⁵ Primarily, the majority's decision was based on the fact that evidence of previous misuse of a firearm by the employee, Sebiloane, had not been pleaded. So, had it been pleaded it seems the appeal would not have been upheld.

38. Another case that I will zoom into is that of Booyesen¹⁶ where Ms. Booyesen's boyfriend, Mongo, a police officer on duty, in police uniform, was brought in a police vehicle to her home for dinner. The colleague who left him there was meant to fetch him later on for him to continue with his police duties for the night. After meals, while they were seated outside without a quarrel, he just drew a service pistol, shot her in the face, and then turned the pistol on himself, fatally.

39. At this stage of enquiry various factors and considerations should be weighed as was formulated in *Rabie*¹⁷ and developed in *K*¹⁸ and refined in *F*.¹⁹

40. It is trite that the test for vicarious liability is a two-stage enquiry for the imposition of vicarious liability in the so-called deviation cases.²⁰ Deviation is a matter where: firstly, subjectively speaking the wrongdoer was not on his master's business and therefore did not create a vicarious link, having regard to these subjective considerations of the wrongdoer. Secondly, the state of enquiry is

¹⁵ Minister of Police v Mathibela 2022 JDR 3316 (GP).

¹⁶ Booyesen v Minister of Safety and Security 2018 (6) SA 1; 2018 (2) SACR 607 (CC).

¹⁷ Rabie v Minister of Police 1986 (1) SA 117 (A);

¹⁸ K v Minister of Safety and Security 2005 (6) SA 419 (CC)

¹⁹ F v Minister of Safety and Security 2012 (1) SA 536 (CC).

²⁰ K v Minister of Safety and Security 2005 (6) SA 419 (CC); and F v Minister of Safety and Security 2012 (1) SA 536 (CC) at [40]-[49].

whether, objectively speaking, there is a sufficiently close link between the employee's conduct and the business of the employer.

41. In respect of the first subjective requirement Emmanuel was pursuing his own interest (on his own frolic), while on duty, expected to be in his post in Randfontein. He was not on his master's business. He had also deviated from the generally accepted norm of his employer, SAPS. In respect of the second requirement, whether objectively speaking, there is a sufficiently close link between the Emmanuel's conduct and the business of his employer, that requires attention.

42. *In casu*, Emmanuel was on duty, in the Randfontein Tactical response team. Accordingly should have been in police uniform. Even though when he arrived at his cousin's house asking for a trouser from her husband to wear, he was apparently in a gown.²¹ He was also driving his own private Ford Ranger, known by neighbours, and seen speeding out of the complex shortly after the shooting. He used his service Vektor Z88 9mm pistol to shoot the deceased. The deceased was equally a police officer who was off-duty, and whose firearm was removed from its safe by police attending to the crime scene after her demise.

43. The question remains in this case whether there is a sufficient link between the conduct of Emmanuel and his employment to impose vicarious liability on the Respondent.

44. The normative factors to be considered were stated in *F*, where Mogoeng CJ enumerated them as follows : "...a) the state's constitutional obligations to protect

²¹ Exhibit A, police docket.

the public; b) trust that the public is entitled to place in the policeman, c) the significance, if any, of the policeman having been off duty and on standby duty, d) the role of a simultaneous act of omission to protect the victim or commission, and e) the existence or otherwise of an intimate link between the policeman's conduct and his employment. All these factors complement one another in determining the state's vicarious liability in this matter."²²

45. It is trite that it is the Minister's constitutional obligation to protect the public, and it is for the fulfilment of that obligation and purpose that Emmanuel was employed.

46. In respect of the trust members of the public should have in the police, it was clearly determinable in K and F, as there was no relationship between the police officers and the victims hence their need to trust police officials. However, where there is a close relationship between an officer and the victim, whether a romantic or family relationship, the trust element in relating to the offending officer is considered missing. This is evident in constitutional court case of *Booyesen v Minister of Safety and Security*,²³ which discusses both the Eastern Cape High Court decision and that of the SCA, which remains in force as the Con-Court majority dismissed the appeal on jurisdictional grounds. The Eastern Cape High Court downplayed the significance of this element of trust where there was a romantic relationship as not being primary to prove vicarious liability, but rather the use of firearm, relying on Pehlani.²⁴

²² K supra at para

²³ *Booyesen v Minister of Safety and Security* 2018 (2) SACR 607 (CC).

²⁴ *Pehlani v Minister of Police* (2014) 35 ILJ 3316 (WCC) ([2014] ZAWCHC 146).

47. Reliance by the Eastern Cape High Court, the court of first instance, on the case of Pehlani²⁵ was criticised by the SCA majority decision of Makgoka AJ on the basis that it imposed 'strict liability' on the Respondent, which would only be appropriate if the said Respondent was able to foresee that the employee would pose a danger to the public.

48. In *Minister of Safety and Security v Nancy Msi*²⁶ the Supreme Court of Appeal cited its own judgment in the *Booyesen* matter where the Supreme Court of Appeal held that:

" For liability to arise under such circumstances there must be evidence that the police officer in question, was for one reason or the other, known to be likely to endanger other people's s lives by being placed in possession of a firearm, and despite this he or she nevertheless was issued with a firearm or permitted to continue possessing it. Such was the situation in F, where the police officer was retained in the employ of SAPS as a detective despite previous criminal convictions".

49. I pause to state that '*in casu*', it is clear that there was a history of domestic violence between Emmanuel and the deceased, which had spilled into their workplace, the police station in which they both worked as police officers. With the intervention of the deceased's father among others, a police captain himself in the SAPS, both parties were disarmed of their service pistols. Though within a week of this disarmament, they were given back their service pistols. RHH, the deceased's father, does not know how this occurred without a proper enquiry into

²⁵ *Pehlani v Minister of Police* (2014) 35 ILJ 3316 (WCC) ([2014] ZAWCHC 146.

²⁶ ZASCA 26 (28 March 2019 Case no 273/2018 (2019).

fitness to possess a fire-arm, in terms of the Fire Arms Control Act 60 of 2000. Under cross-examination confronted with SAP 96 document, which among others indicated that Emmanuel was “not unfit to possess a fire arm”, his response was that from his experience that SAP 96 form is used by the SAPS inhouse social worker when engaging the parties in dispute. He maintained that it does not point to the aforementioned prescribed enquiry being held, in terms of his experience as a uniformed Captain who presided over these enquiries himself for years.

50. From the evidence before me it is clear that the couple had disputes over money, and Emmanuel was a jealous husband, who always made allegations against the deceased that she was in romantic relations with every male crew she was paired with at work, within the course and scope of employment.

51. I therefore conclude, on this aspect that the employer was aware of Emmanuel’s erratic demeanour. It was foreseeable that he could misuse his service pistol to endanger lives of others, especially his wife and colleagues he suspected to be having an affair with the deceased when the respondent or its functionaries re-issued Emmanuel with a firearm, without psychological intervention to ensure he is mentally safe. Strict liability is justified in the circumstances of this case.

52. Zondo CJ (then DCJ) in his dissenting judgment in *Booyesen*²⁷ after reasoning why he would have decided otherwise in respect of jurisdiction, a ground for dismissal of appeal, he highlights that the statutory and constitutional duty to prevent crime and protect the public from crime does not exclude family members, friends and lovers of a police officer. A person having a relationship with a police officer is not

²⁷ *Booyesen supra* at 109-109

owed less or no protection by that officer in comparison to the broader public. I agree with the learned CJ in this respect, otherwise this would amount to promotion of domestic violence and gender-based violence, which public policy is at odds with.

53. I have already stated that from the evidence of Hobyani, Emmanuel was on duty when he committed the heinous act, and possibly in uniform. The deceased possibly did not even expect him home during the early hours of Monday the 29th January 2018, as he was on duty, while she was not, but at home with their child.

54. In my view, the fact that the defendant was aware of the character or disposition of Emmanuel, and no appropriate intervention as above stated was implemented prior to him or both of them being given the gun back their service pistols, this amounts to an omission on the part of the Respondent on its constitutional imperatives, to ensure that when Emmanuel was allowed to possess a firearm, the public was safe. Emmanuel's action fulfils both the omission and commission requirement, thereby proving a close connection between the wrongful conduct and the business of the respondent.²⁸

55. In Mashongwa,²⁹ the Constitutional Court said the following in respect of the responsibility of state organs:

"...the standard to be applied is not that of the reasonable person, but that of a reasonable organ of state. It held that a reasonable organ of state is expected to take reasonable measures to advance the realisation of the rights in the Bill of Rights; that the availability of resources is an important factor when

²⁸ Booysen supra at para 103-104.

²⁹ Mashongwa v Passenger Rail Agency of South Africa [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR

determining what steps are available to the organ of state and whether reasonable steps were in fact taken; and that it is necessary for the organ of state to present information to the court to enable it to assess the reasonableness of the steps taken.”

56. Mindful of the fact that the respondent's defence was struck out, and its counsel could not do not much, but only test the evidence of the Applicants, I nonetheless have no evidence of any reasonable steps taken by the Respondent prior to restoring Emmanuel's pistol back to him.

57. Taking all the above factors into consideration, I hold that there is a close connection between the conduct of Emmanuel and the business of the employer. The minister is therefore vicariously liable for the actions of Emmanuel and the damages suffered by all three applicants in the matter.

Quantum of damages:

58. It is trite that RH would be entitled to be compensated for the loss of support by her mother, the deceased, as a result of the vicarious liability of the first respondent, emanating from the actions of Emmanuel.

59. It is an undisputed fact that the time RH's mother was killed she was only three years old. She is 10 at the time of the hearing of this matter. An actuarial report, Exhibit B, compiled by Mr. Ndumiso Mavimbela of Manala Actuaries and Consultants, specifically focuses only on addressing the child's claim and needs to determine what she is entitled to claim from the first respondent, and is therefore helpful to the court. In addition, the evidence of both grandparents, and

also the evidence of the therapist social worker, Mr. Muzi Happiness Mandlazi, is pivotal in respect of the child. The latter's evidence is relevant for the two adult applicants' claims too.

60. I do accept that RH has suffered emotional trauma and did suffer shock out of witnessing her mother being shot by her father. The observations of the child by the grandmother, the grandfather and the Mr. Mandlazi do confirm same. The arguments by the Respondent's counsel that the child being withdrawn, easily irritated and avoiding people, including her immediate cousins she grew up with when they are in the house is just a normal change that comes with growth simply because at school she is performing well, does not hold water. Clearly as she grows up, now understanding what really happened, that her mother is not coming to fetch her to their home in Randfontein as she is dead. She has been taken to her grave several times. She can't see her father who is in prison serving his long sentence. She is aware that her grand parents are not her parents, seeing cousins referring to them correctly, unlike her calling them mom and dad. It is impossible that all these circumstances would not affect her negatively. I agree with the social worker that she does need further therapy consultations to bring her closer to normality.

61. First applicant is receiving an annual payment on behalf of RH, from the Guardian's fund at the Master of the High Court, which is used to address her school need, though never enough, as it does not cover school excursions etc. they have to augment. First applicant also receives foster grant money of R1160 monthly from the Department of Social development. These sources of income are far from being sufficient to address the need of the child, hence the claim for

loss of support. According the actuarial report of Mr. Mavimbela in respect the first scenario, until RH reaches 18 years of age, he recommends R1 052 049. In respect of the second scenario, which speaks to the scenario until she reaches age 21, he quantifies it at R1 231 260.

62. Counsel for the respondent argued that the actuary's recommendations, above, did not factor in the social grant and income from the guardian's fund. Firstly, I am not aware how much is left in the guardian's fund, and whether it is sufficient to continue maintaining the child's school fees till she reaches grade 12 and beyond or not. This is especially because the deceased mother was still a constable, of not such a long period in the SAPS.

63. Social grant of R1160 is by far insufficient in comparison with what the deceased would be spending on RH. Even if factored in the second scenario, per annum it will be only R13 920,00, and times the remaining 11 years till she turns 21, which is relevant even according to argument of the respondent's counsel that the child is performing well academically, its highly probable she may proceed to tertiary education till she is 21 years old. On a simple calculation it amounts to a total of R153 201. If deducted, which I do not recommend, the total becomes R1 078 140, on a loss of support claim only, excluding the emotional shock and trauma delictual claim and further consultations that she still has to attend for therapy. These have also not been added in the report, otherwise the figure would be bigger. These tend to off-set each other. Efforts by second applicant to access Emmanuel's pension funds to maintain RH were not successful, as only he can consent to their usage.

64. Even though the actuary did not compile any report regarding the first and second applicants, the evidence of Mr. Mandlazi does shed light on how these adults and parents of the deceased became affected, including the whole family, some who are not parties herein. Even as they individually testified in court, the court had to take pauses for them to emotionally cool down, as they were overcome by grief and breakdown in tears as they related what happened at the scene of the crime, and how the whole ordeal subsequently changed their lives, with the first applicant stopping to run the tuck-shop, and the second applicant resigning from SAPS out of being unable to reconcile trying to bring healing on RH, and having to wake up and wear the same police uniform and carrying a firearm, both which her parents used to wear and carry, which traumatised her, according to him. He ultimately resigned as a captain, and both he, first applicant and RH survive on his pension.

65. In exercising its discretion, the Court should make a discount of for “contingencies” or the “vicissitudes of life” such as illness, unemployment, life expectancy, early retirement and other unforeseen circumstances.³⁰ The determination of the general contingency deductions to be made lies squarely in the discretion of the Court, which must decide what is fair and reasonable³¹. The court is therefore expected to use contingency deductions to provide for any future circumstances that may occur but cannot be predicted with accuracy or precision. Basically, with these unforeseen contingencies, the longer the period the more the accuracy of the amount deemed to be probable income of the

³⁰ Road Accident Fund v Guedes 2006 (5) SA 583 (SCA), at para 3.

³¹ Fulton v Road Accident Fund 2012 (3) SA 255 (GSJ), para 95-96; and Nationwide Airlines (Pty) Ltd (in liquidation) v SA Airways (Pty) Ltd [2016] 4 All SA 153 (GJ), at para 147.

plaintiff, the higher the contingencies must be applied. The actuarial calculations are therefore helpful to the Court, though not binding, as the Court's discretion is wide to award compensation it considers fair and reasonable. The Courts have recognised that the fortunes of life are not always adverse, but may be at times be favourable.³²

66. In *Glenn Marc Bee vs RAF*³³ it was stated that "It is trite that an expert witness is required to assist the court and not to usurp the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court must satisfy itself as to the correctness of the expert's reasoning."

67. Also, in *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*³⁴ it was stated that: "[l]astly, the expert evidence lacked any reasoning. An expert's opinion must be underpinned by proper reasoning in order for a court to assess the cogency of that opinion. Absent any reasoning the opinion is inadmissible".

68. I am satisfied with the evidence of both experts, one via viva voce evidence, and the other via expert report. In respect of RH it is my view that there is no need to factor any contingencies as the fortunes of life are not always adverse.

69. In the result, I make the following order:

- a. The First Respondent (first defendant in the main action) held vicariously liable 100% of the first, second and third Applicants' proven damages.

³² *Southern Insurance Association v Bailey* N.O. (supra) at para 117B.

³³ 2018 ZASCA 52 at para 22.

³⁴ [2015] ZASCA 164; 2016 (2) SA 586 (SCA) para 15.

- b. The Defendant shall pay the RH the total amount of R1 931 260 (One Million, Nine hundred and Thirty-One thousand, two hundred and sixty rand) only.
- c. The Defendant shall pay MCH the total amount of R500 000 (Five hundred thousand rand) only.
- d. The Defendant shall pay RHH the total amount of R500 000 (Five hundred thousand rand) only.
- e. The amount in paragraph b is made up as follows:
 - a. Loss of support: R1 231 260 (Two Million, Nine hundred and Forty-seven thousand, six hundred and ninety-two rand) only.
 - b. Emotional shock and discomfort: R700 000 (Seven Hundred Thousand rand) only.
 - c. Payments will be made directly to the trust account of the Plaintiff's attorneys within 180 (one hundred and eighty) days from the date of the granting of this order.
 - d. The Defendant is to pay the Plaintiff's agreed or taxed High Court costs as between party-and-party, such costs may include the following, provided that same is subject to the discretion of the taxing master:

- i. The preparation, qualifying and reservation fees of the experts, consequent upon obtaining Plaintiff's reports, if any, including costs of the compilation of such reports, addendum reports and confirmatory affidavits;
 - ii. The costs of counsel on scale C,
 - iii. The costs of the 8th May 2025, 16 July 2025 and 17 July 2025.
- e. The Plaintiff shall, in the event that the costs are not agreed:
- i. serve the Notice of Taxation on the Defendant and/or the Defendant's attorney of record; and
 - ii. allow the Defendant one hundred and eighty (180) day to make payment of the taxed costs after service of the taxed bill of costs.




LMA MATJELE

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant:

Adv BM Khumalo

Attorneys for the Applicant:

HC Makhubele incorporated.

Tel: 010 880 7267

reception@hcmakhubelinc.co. za

Counsel for the Respondent: Adv B Letuka

Attorneys for the Respondent: State Attorney,
10th Floor, North State Building,
95 Albertina Sisulu Street, **Johannesburg**
Mr. T. Mpulo.

Date of the Hearing: 16 July 2025

Heads of Argument: 21 July 2025

Date of Judgment: 11th December 2025