



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 10371/2016P

In the matter between:

FLORENCE MABHONI KOBELA

1ST PLAINTIFF

N[...] S[...] A[...] S[...] OBO

I[...] L[...]

2ND PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

ORDER

The following order is granted:

The plaintiffs' action is dismissed, each party to bear its own costs.

JUDGMENT

Sibiya J:

Introduction

[1] The plaintiffs seek relief against the defendant for loss of support based on the death of B[...] L[...] (Mr L[]), who was shot and killed by T[...] N[...] (Ms N[]), both of them being police constables on the relevant date of 3 March 2014. The first plaintiff is the mother of Mr L[], with the second plaintiff being the mother of Mr L[]'s child.

[2] The plaintiffs' case, in a nutshell, is that senior officials in the employ of the Minister of Police (the Minister) were aware of the danger posed by Ms N[] to Mr L[], they owed Mr L[] a duty to prevent harm to him, they were negligent in failing to take the necessary steps and this negligence caused Mr L[]'s death. It has not been alleged that Ms N[] was acting in the course and scope of her employment with the Minister, but rather that she used the official firearm in killing Mr L[]. The first plaintiff's claim is specifically based on her indigence.

[3] The plaintiffs' claim can only be characterised as delictual. This means that the plaintiffs must prove a wrongful act or omission, negligence on the part of the defendant and causation, namely that it was that wrongful and negligent conduct that caused the damages suffered by the plaintiffs. All the elements must be proven for the plaintiff to succeed. The plaintiffs specifically pleaded reliance on s 102 of the Firearms Control Act 60 of 2000 (the Act) in support of both negligence and a wrongful omission.

[4] The plaintiffs presented the oral evidence of the first plaintiff and a bundle of documents whose status was that they were what they purported to be, but the content is not admitted as the truth, which documents were marked as 'exhibit A'/'Plaintiffs' Index'. The first plaintiff testified as follows:

- (a) She was referred to a statement that she had prepared soon after the killing and confirmed it and its contents, indicating that she had been asked about what she knew of the relationship between Mr L[] and Ms N[].
- (b) Mr L[] and Ms N[] did not have a good relationship, as he had called her and informed her that Ms N[] was attacking him, and on her arrival at the place he

was renting, she found police vehicles outside and police officers inside the room. She noticed that Ms N[...] was also injured.

(c) A police officer named Sokhela (Sergeant Sokhela) told her not to worry as their commander was present, pointing at an Indian police officer named Lamech (Col Lamech). Sergeant Sokhela told her that Ms N[...] also worked with them. She asked how they would work together, as they did not get along, and Sergeant Sokhela said Col Lamech was saying that they would sort out the issue. She had never received feedback on how the matter was being sorted out.

(d) She was asked if she knew Colonel Isaiah Ngubane (Col Ngubane) and whether she had met him before or after the killing, and she responded that she had met him at some offices, where he had called her and the second plaintiff, and this was after the killing.

(e) In relation to her indigence, she testified that although she is married, Mr L[...] had been buying her groceries since 2006 when he was a casual worker at Edgars. When he joined the police in 2008, he would buy her groceries and give her R1 500 each month. He also used to take her to the doctor. Just before he died, Mr L[...] had bought her a stand to build a house in Enqabeni, which is between Howick and Hilton.

(f) She testified that her husband had been employed earning R3 800 per month until 2015, after which he was unemployed and relied on 'pension'. The first plaintiff had also been employed at Manchester making shoes, which came to an end about three years before Mr L[...]’s job at Edgars.

(g) She testified that she and her husband reside in a municipal accommodation at 7[...] W[...] Street, where they pay for rates, electricity and water but were struggling to maintain the payments. Their standard of living had gone down since the passing of Mr L [...], and they rarely get to eat meat and vegetables, but rather eat whatever they can, just to ensure that they do not sleep on empty stomachs. She is 63 years old and had been receiving an old-age pension since March 2024, but it was not enough.

[5] Under cross-examination:

(a) The first plaintiff stated that she could not remember when the incident she testified about had taken place, but that it was her only interaction with Ms N[...]. She testified that she knew about the protection order taken by Mr L[...] against Ms N[...],

but when asked whether the incident was before or after the protection order, she said she did not know.

(b) She was referred to her statement wherein another interaction with Ms N[...] was reflected, and her response was that this was on another day. She also confirmed another interaction in 2013, when Ms N[...] came to report that she was pregnant with Mr L[...]’s baby. She accepted that this was after Mr L[...] took out the protection order, and that he still continued a relationship with Ms N[...].

(c) The defendant’s version was put to her, that Mr L[...] and Ms N[...] carried out their relationship in secret without the knowledge of the police, whom they had told they had terminated the relationship, and that Mr L[...] had placed himself in danger by pursuing a relationship with someone he considered to be dangerous.

[6] The first plaintiff was not re-examined and after the first plaintiff responded to the court’s questions, stating that Mr L[...] was born on 17 May 1984 and that she was receiving a pension of R2 400, the plaintiffs closed their case.

[7] Ms *Mamvura*, who appeared for the defendant, opened the defendant’s case by explaining that the incident that the first plaintiff testified about had taken place in October 2012. She explained that no incident involving Mr L[...] and Ms N[...] was brought to the attention of the police between 2012, when a protection order was taken out, and 2014, when Mr L[...] was killed, and it was only after the murder that the colonels were made aware of a relationship between Mr L[...] and Ms N[...].

[8] The defendant advanced the oral evidence of two witnesses: Delrys Genias Lamech (Col Lamech) and Mmeli Isaiah Ngubane (Col Ngubane). They also produced a bundle of documents which they never referred to in evidence.

[9] Col Lamech testified that:

(a) He is the provincial co-ordinator for the Tactical Response Team (TRT) and in 2012, he was the operational commander at the Pietermaritzburg TRT. He knew Mr L[...], who was a TRT operator on one of the shifts, and he served a protection order on Ms N[...] from Mr L[...].

(b) He knew of only one incident involving the two, and that was on 24 October 2012, when he attended a dispute at the residence of Mr L[...]. He received a phone

call after hours from Sergeant Sokhela, who was a friend and team leader of Mr L[...], reporting the incident. On his arrival at Mr L[...]'s residence on Berg Street about an hour later, he was met by Sergeant Sokhela, who led him to a room in which he found Mr L[...], the first plaintiff and Ms N[...]. Everything was calm and Ms N[...] was talking to the first plaintiff.

(c) He telephoned the unit commander, Col Ngubane, who instructed that the two members should come to his office the following day at 8 am, as he was at that time in Pretoria.

(d) On 25 October 2012, at 8h30, a meeting took place between Col Lamech, Col Ngubane, Ms N[...] and Mr L[...], where Mr L[...] informed the colonels that the dispute was because the two of them had been in a romantic relationship, which he had ended in August 2012 but that Ms N[...] was unhappy with the break-up. After enquiring about the length of the relationship, Col Ngubane instructed Col Lamech to take Ms N[...]’s firearm and place it in safekeeping, which he did.

(e) Col Ngubane made arrangements for Ms N[...] to be moved to Thornville and referred her to employee assistance services within the police for counselling. She started at Thornville on 26 October 2012. On 31 October 2012, Col Lamech was requested to serve an interim protection order that had been obtained by Mr L[...] on Ms N[...], and he did so.

(f) Ms N[...] remained at Thornville for about six months. Around May 2013, Ms N[...] reported that she had completed counselling and was fit to return to the unit. A meeting was convened with the same parties that attended the meeting on 25 October 2012, and both Ms N[...] and Mr L[...] confirmed that they had not been in any relationship since the last time and were not contemplating any relationship in future.

(g) Ms N[...]’s fitness was discussed, and it was agreed by all present that she could return to duty. To err on the side of caution, Ms N[...] and Mr L[...] were placed on different shifts, so that they would not be on rest duty at the same time. The meeting ended on that, and there were no further reports of a relationship or a dispute involving the two of them. They carried out their duties without incident. About a year later, they were informed of the shooting.

[10] Under cross-examination, it was put to Col Lamech that he was fabricating the meeting of May 2013 in which the return of Ms N[...] was discussed and agreed to by

Mr L[...], because in his affidavit of 2014, he had not mentioned it. Col Lamech insisted that the meeting had occurred and that his testimony in that regard was an accurate recollection of events. He denied that it was an afterthought intended to give the impression that the defendant had done its best.

[11] After initially insisting that he only knew of one incident, Col Lamech conceded that Mr L[...] had called him earlier saying his fiancée was being followed by a white vehicle driven by Ms N[...] and that she had started an argument with him. It was later that evening that he was called to the incident at the home of Mr L[...]. He further stated that at the meeting the following day, they had downplayed the incident.

[12] Col Lamech denied any knowledge of a final protection order. He confirmed that Ms N[...], at the meeting of 25 October 2012, had said she was depressed about their breakup, and this was the reason she was referred to employee assistance services. He also confirmed that he was aware that Ms N[...] had laid a charge of rape against Mr L[...] on the evening of 31 October 2012, the day he had served the protection order. He was aware that the charge was withdrawn the following day.

[13] Col Lamech denied that he considered Ms N[...] and Mr L[...] to be unreliable at the time, saying that he and Col Ngubane had believed them. It was in hindsight, when they made their discoveries, that he considered that they had not been forthcoming about their relationship. It was put to him that Ms N[...]’s firearm was removed to protect both her and Mr L[...], but Col Lamech responded that he did this because he was instructed by Col Ngubane to put it away for safekeeping.

[14] Col Lamech confirmed that he had a conversation with the first plaintiff at the house of Mr L[...] and informed her, Mr L[...] and Ms N[...] that Col Ngubane was convening a meeting the next day at 8 am. He reiterated that when he arrived, it was calm and the first plaintiff was in conversation with Ms N[...]. He confirmed that Sergeant Sokhela informed him that Ms N[...] and Mr L[...] were fighting or arguing, but denied being told that Sergeant Sokhela had heard the sound of a cocking firearm, broken the door open and found both Ms N[...] and Mr L[...] holding the firearm. He also denied having been given the firearm by Sergeant Sokhela, but

admitted being the one who returned the firearm to Ms N[...] in May 2013 when she returned from Thornville.

[15] Col Lamech disputed that he ought to have prepared an affidavit for an officer who would assess the fitness of Ms N[...], saying that the situation did not warrant it and that he had no information that would trigger an investigation into Ms N[...]’s fitness. It was put to him that he had sufficient information, and that his failure to conduct an enquiry constituted negligence and this negligence resulted in allowing Ms N[...] to keep the firearm, which resulted in the killing of Mr L[...]. This was disputed by Col Lamech, insisting that his actions were appropriate given what he had witnessed on 24 October 2012. He denied that he failed to protect the life of Mr L[...] when he had the means to do so, saying he had taken all the steps necessary.

[16] Col Ngubane testified that:

(a) In 2012, he was a unit commander in the same building as the TRT, and he was in Pretoria when he was informed telephonically about a dispute between two members by Col Lamech, whom he informed to attend to it, and then tell the members to come to his office on the next day so that he could discover what the argument was about, as they worked together in the same unit, and on the same shift.

(b) The following day at the meeting, Col Lamech stated that when he arrived at the scene, it was calm and he had spoken to the first plaintiff, who was at that time talking to Ms N[...]. Mr L[...] informed them that he and Ms N[...] had been in a relationship but it had ended about a month or so earlier, but Ms N[...] was calling him and coming to the residence he was renting with a fiancée or girlfriend and that is what had happened the previous night. Ms N[...] confirmed that she could not accept the rejection by Mr L[...] and would spend sleepless nights thinking about it.

(c) He then decided to withdraw her from TRT as it is a critical unit, made arrangements to transfer her to Thornville and referred her to employee wellness service. He further instructed Col Lamech to take Ms N[...]’s firearm, as she would not be working outside until she completed the sessions with employee wellness service.

(d) Mr L[...] indicated that he had blocked Ms N[...]’s number on his phone, but, in addition, would be seeking a protection order against her. Col Ngubane advised him

to do what he thought best. He asked them about their relationship and they each confirmed that there was no relationship anymore.

(e) On 30 or 31 October 2012, he became aware of the protection order and instructed Col Lamech to serve the order on Ms N[...], who did so. The following day, on 1 November 2012, he was asked by the station commander of Prestbury if he was aware that Mr L[...] was involved in a rape charge involving Ms N[...], and at that point, he thought the station commander was joking. He then asked Mr L[...] who responded that he could not deny it. Col Ngubane then asked him how he was sleeping with Ms N[...] after obtaining a protection order against her, and there was no response. He did not probe further as this was a criminal case that had been opened and he did not want to interfere.

(f) He testified that Ms N[...] had worked at Thornville from that time until about May or June 2013, when she indicated that she had finished seeing the doctor and was ready to return to work. A meeting was convened with Ms N[...], Mr L[...], Col Lamech and a Sergeant Ngobeni. Mr L[...] confirmed that he had not received any phone calls nor had he been followed by Ms N[...] since the time she left, and that he would be happy for her to return to the TRT. Ms N[...] was nevertheless placed on a different shift so that they did not work together.

(g) He then instructed Col Lamech to return the firearm to Ms N[...], as members of the TRT were always on standby and were always facing threats from syndicates.

(h) In March 2014, he received information of a shooting that took place where Mr L[...] was staying and he made his way there and found the local police interviewing a witness who said the shooter was a heavily pregnant, short African woman and this matched Ms N[...]’s description. He dialled her phone but she did not answer, and he activated TRT to locate her with SNIPR cameras but they were unsuccessful that evening. Ms N[...] presented herself at the Vryheid police station a few days later.

[17] Under cross-examination, he was shown a statement that he confirmed was his, detailing what he knew of the relationship between Mr Lembede and Ms N[...]. He conceded that his statement did not mention the meeting of May/June 2013 and he responded that he remembered it because he was required to hold such a meeting before allowing Ms N[...] to return. He denied that it was an afterthought intended to create the impression that they had done everything to save the situation.

[18] He further confirmed that it was the letter from the doctor that satisfied him as to the readiness of Ms N[...] to return to work, and when asked why the statement made no mention of the doctor's letter but instead stated that he relied on Ms N[...]’s say-so, Col Ngubane responded that there were shortcomings in his statement. He confirmed that at the meeting in October 2012, Ms N[...] had indicated that she was suffering from ‘a depression’ and that, to him, her emotional and psychological state required attention. He denied that the registering of a rape charge gave him the impression that despite their words to the contrary, Mr L[...] and Ms N[...] were still seeing each other, saying that it was reported as a rape and he did not follow up as it was being investigated by a different unit.

[19] It was put to Col Ngubane that as he called Mr L[...] to ask him about the charge, a reasonable officer would have followed up on the rape charge, but he insisted that they do not follow up because it might be interpreted as interference in the investigation. He was asked if the reasons for the protection order were consistent with the content of the protection order and he confirmed this.

[20] When asked about whether Sergeant Sokhela had informed him of any incident in which he disarmed Mr L[...] and Ms N [...], who were fighting over a firearm, he denied this, and further denied ever communicating with Sergeant Sokhela about the two colleagues or the firearm. Col Ngubane was referred to the final protection order in the bundle and he denied ever having known of its existence.

[21] It was put to Col Ngubane that given the information in the interim protection order, nothing prevented him from preparing a statement under oath and submitting it to the officer dealing with an inquiry into the fitness of the police officer to possess a firearm, as required by s 102 of the Act. Col Ngubane disagreed, stating that this was the purview of the police station receiving the final protection order, as it is that station that does the inquiry. He insisted the inquiry only follows on the final protection order being granted not the interim order.

[22] Col Ngubane stated that a statement is usually done when a case is opened, indicating there was a threat to kill, and denied that anyone who has information of

an expression of an intention to kill had an obligation to require an inquiry. He denied that the death was foreseeable and that it caused the loss to the first plaintiff and the second plaintiff's child, saying that on his side it was not foreseeable. He had no comment on the suggestion that the failure to trigger an inquiry resulted in the death of Mr L[...] with a State-issued firearm.

[23] There was no re-examination and the defence then closed its case. The matter was adjourned for closing arguments on 15 April 2026.

Plaintiff's submissions

[24] Mr *Ndlovu* made submissions on behalf of the plaintiffs under the following six headings.

The duty of care

[25] The defendant owed the plaintiffs a legal duty of care. He submitted that the police had a duty to take the firearm from Ms N[...] and only return it after she had been subjected to an inquiry into her fitness. This duty of care was said to flow from s 205(3) of the Constitution, as amplified in *Minister of Safety and Security v Van Duivenboden*,¹ where the court stated that

'While private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, and while there might be no similar constitutional imperatives in other jurisdictions, in this country the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights.' (Footnote omitted.)

[26] He also referred to *Dlanjwa v Minister of Safety and Security*,² where the court stated the following

'I fail to understand why the appellant must be indicted for not having complained to senior officers at the police station when the deceased was not disarmed as the defence counsel urged us to do. The duty lay squarely on the police to investigate her complaints once she reported that she feared for her safety. As the trial court pointed out, the Constitution, in s 12 (1)(c) which guarantees the right to freedom and security of the person, including the right to be free from all forms of violence, and the South African Police Service Act, impose a

¹ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) (*Van Duivenboden*) para 20.

² *Dlanjwa v The Minister of Safety and Security* [2015] ZASCA 147 para 24.

positive obligation on the police to ensure the safety and security and protect the members of the public in general and women and children in particular from violent crime.’ (Footnotes omitted.)

Negligence

[27] He submitted that the police were negligent in returning the firearm to Ms N[...] without holding an inquiry in light of the information that Col Lamech was privy to, which was reflected in the interim protection order, in particular pages 31 to 32³ thereof, as he had testified he was privy to the content. Mr *Ndlovu* accepted that it was not for Col Lamech to adjudicate the protection order but insisted that it was still before him. According to Mr *Ndlovu*, what was contained in the relevant pages was that there was another altercation on 25 October 2012, before 8 am, during which Ms N[...] threatened to shoot herself and Mr L[...], resulting in Mr L[...] taking the firearm away and this was sufficient to trigger the provisions of s 102.

[28] He referred to the evidence of the first plaintiff that on the relevant night, both Mr L[...] and Ms N[...] were injured, which was not challenged or disputed in cross-examination, and it was impossible that Col Lamech would have missed the injury. He further relied on *Van Rooyen v Minister of Police*⁴ and other cases for the submission that the failure of the police officers to act in relation to the firearm, having come to the knowledge of information that Ms N[...] intended to kill or injure another person, constitutes negligence.

Causation

[29] Mr *Ndlovu* submitted that the test for causation is set out in *International Shipping Co (Pty) Ltd v Bentley*,⁵ which includes both legal and factual causation and whether there is a sufficiently close link between the omission and the harm. He submitted that foreseeability applied both subjectively and objectively. Mr *Ndlovu* argued that the foreseeability of harm was evident from the fact that they took away the firearm from Ms N[...] and put it into a safe for a period of time. Having foreseen

³ Contents of pages 31 and 32 of the interim protection order are reproduced in para 49 of this judgment.

⁴ *Van Rooyen v Minister of Police* 2013 JDR 1149 (GNP).

⁵ *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) (*International Shipping*).

the harm, what they did wrong was returning the firearm without holding the inquiry in terms of s 102.

[30] Regarding objective foreseeability, he submitted that a reasonable police officer in the position of Col Lamech and Col Ngubane would have foreseen the harm occurring, and the foreseeability relates to Ms N[...] being in possession of a firearm without being properly assessed in terms of the law.

Credibility of witnesses

[31] Mr *Ndlovu* submitted that Sergeant Sokhela had made a statement that contradicted the evidence of Col Lamech in relation to him getting hold of the firearm during the incident on the evening of 24 October 2012, and handing it to Col Lamech, which version was disputed by Col Lamech. He argued that the court should consider the failure to call Sergeant Sokhela as reflecting negatively on the credibility of Col Lamech. He further submitted that because the statement was made by an employee of the Minister, it constitutes an exception to the hearsay rule, relying on *Botes v Van Deventer*,⁶ and *Moscon Thyme CC v J P Krugerrand Deals CC*.⁷

[32] He submitted that both Col Lamech and Col Ngubane testified of a second meeting in 2013 but it should be treated as an afterthought, as it was not mentioned in either of their statements and only one meeting was pleaded. He urged the court to approach the defendant's case by accepting that there is an unfavourable statement which is inimical to the interests of the defendant, which should be viewed dimly in light of the status of the documents and the admission contained therein.

Indigence of the first plaintiff

[33] Mr *Ndlovu* submitted that the unchallenged evidence of the first plaintiff demonstrated her indigence. He referred the court to *Gesina v Road Accident Fund*,⁸ *Langa and Others v Road Accident Fund*⁹ and other cases.

⁶ *Botes v Van Deventer* 1966 (3) SA 182 (A) at 206A-C; see also *Zungu NO v Minister of Safety and Security* 2003 (4) SA 87 (D) at 94C-95B.

⁷ *Moscon Thyme CC v J P Krugerrand Deals CC* [2014] ZAGPJHC 24 paras 10- 11 .

⁸ *Gesina v Road Accident Fund* [2017] ZAGPPHC 188 paras 7-10, and 14-20.

⁹ *Langa and Others v Road Accident Fund* [2016] ZAGPPHC 876 paras 13-14.

Onus

[34] The plaintiffs accepted that they bore the onus of proving, on a balance of probabilities that the defendant had a legal duty, was negligent and such negligence caused the harm and the consequences of the harm, as well as the indigency of the first plaintiff. He submitted that the balance of probabilities was in favour of the plaintiffs, particularly in relation to negligence and causation.

Defendant's submissions

[35] Ms *Mamvura* summarised the defence's evidence as two people who worked together as police officers and had a romantic relationship, unbeknown to their superiors. An altercation had occurred between them and Col Lamech had attended the scene and on his arrival, he briefed Col Ngubane and a meeting was held the next day, on 25 October 2012, at which it was established that they had been in a relationship, which had been terminated by Mr L[...], and that Ms N[...] could not accept the termination.

[36] She stated that the steps taken following this discovery were that Col Lamech, on Col Ngubane's instruction, had confiscated Ms N[...]’s firearm, Ms N[...] was transferred to Thornville, ensuring that she was separated from Mr L[...], and further referred to employee wellness services. Both Ms N[...] and Mr L[...] gave assurances that they were no longer seeing each other. Mr L[...] expressed an intention to obtain a protection order and such protection order was served on Ms N[...] on 31 October 2012. This was enough for the police to accept that the situation was under control.

[37] Ms *Mamvura* further stated that following a phone call from Ms N[...] in 2013, in which she indicated to Col Ngubane that she was ready to return to work, a meeting had been held with both Mr L[...] and Ms N[...], as well as Col Lamech. As a sign of caution, when she was allowed to return, they were assigned to different shifts. There were no incidents reported involving Mr L[...] and Ms N[...] from 2013 until the incident which resulted in the killing of Mr L[...] in 2014. The shooting was a shock to both Col Lamech and Col Ngubane and this incident could have been averted had Mr L[...] not violated the protection order, as it turned out that he was in a secret relationship with Ms N[...].

[38] She submitted that Ms N[...] and Mr L[...] were adult police officers and did not need to be babysat by their superiors. She repeated that it was the evidence of the first plaintiff that Ms N[...] had reported a pregnancy, which resulted from Mr L[...]. Her final submission was that the defendant was not negligent and had taken all the steps a reasonable police officer would have taken under the circumstances.

[39] In response to Mr *Ndlovu*, Ms *Mamvura* repeated that although both Col Ngubane and Col Lamech had been present and given evidence, they had not been confronted with the contents of the protection order for it to be tested. She concluded by submitting that the plaintiffs had failed to discharge the onus on them and that the action should be dismissed with each party to pay their own costs.

The law

[40] Section 102 of the Act deals with a declaration by the registrar of a person as being unfit to possess a firearm. The section provides for various instances that a person may be called upon to answer why they should not be declared unfit to possess a firearm. Although not specified in the particulars of claim, it appears that the plaintiffs rely on ss 102(1) and (2) of the Act, which provide that:

‘102(1) The Registrar may declare a person unfit to possess a firearm if, on the grounds of information contained in a statement under oath or affirmation including a statement made by any person called as a witness, it appears that-

- (a) a final protection order has been issued against such person in terms of the Domestic Violence Act, 1998 (Act 116 of 1998);
- (aA) a final protection order has been issued against such person in terms of the Protection from Harassment Act, 2011;
- (b) that person has expressed the intention to kill or injure himself or herself or any other person by means of a firearm or any other dangerous weapon;
- (c) because of that person's mental condition, inclination to violence or dependence on any substance which has an intoxicating or narcotic effect, the possession of a firearm by that person is not in the interests of that person or of any other person;
- (d) that person has failed to take the prescribed steps for the safekeeping of any firearm; or
- (e) that person has provided information required in terms of this Act which is false or misleading.

- (2) A declaration under subsection (1) may only be issued if the Registrar-
- (a) by notice in writing delivered by hand to the person, has called upon the person to appear before the Registrar at a time and place determined therein in order to advance reasons as to why that person should not be declared unfit to possess a firearm;
 - (b) has given that person a reasonable opportunity to advance reasons as to why the declaration should not be issued;
 - (c) has duly considered the matter;
 - (d) is satisfied that the person is unfit as contemplated in subsection (1); and
 - (e) does not rely solely on the same facts relating to a conviction in respect of which a court has made a determination in terms of section 103 (1) or (2) that the person is not unfit to possess a firearm.'

[41] Section 205 of the Constitution provides in subsec 3 that:

'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'

[42] The requirements for delictual liability are already set out in paragraph 3 of this judgment. Where a wrongful act consists of an omission or failure to act, the test is whether there existed a legal duty to act to avoid harm in the prevailing circumstances. Mr *Ndlovu* already referred to the relevant case law. In *Van Duivenboden* the court stated that:¹⁰

'Where there is a potential threat of the kind that is now in issue the constitutionally protected rights to human dignity, to life and to security of the person are all placed in peril and the State, represented by its officials, has a constitutional duty to protect them. It might be that in some cases the need for effective government, or some other constitutional norm or consideration of public policy, will outweigh accountability in the process of balancing the various interests that are to be taken into account in determining whether an action should be allowed ... but I can see none that do so in the present circumstances.... In this case we are concerned only with whether police officers who, in the exercise of duties on behalf of the State, are in possession of information that reflects upon the fitness of a person to possess firearms are under an actionable duty to members of the public to take reasonable steps to act on that information in order to avoid harm occurring. There was no suggestion by the appellant that the recognition of a legal duty in such circumstances would have the

¹⁰ *Van Duivenboden* para 22.

potential to disrupt the efficient functioning of the police or would necessarily require the provision of additional resources, and I see no reason why it should otherwise impede the efficient functioning of the police - on the contrary the evidence in the present case suggests that it would only enhance it. There is no effective way to hold the State to account in the present case other than by way of an action for damages and, in the absence of any norm or consideration of public policy that outweighs it, the constitutional norm of accountability requires that a legal duty be recognised.' (Footnotes omitted.)

[43] In *Minister van Polisie v Ewels*,¹¹ the court held that a negligent omission is unlawful conduct when the circumstances are of such a nature as to not only evoke moral indignation but also the legal convictions of a community require that it should be regarded as unlawful. In short, if police officers are aware of a threat posed by a police officer to the right to the life and safety of a person, and they fail to take reasonable steps to ensure that harm is prevented, that failure will constitute wrongful conduct.

[44] The test for negligence was long established in *Kruger v Coetzee*¹² as being whether a reasonable person in the position of the defendant would have foreseen the possibility of harm, and having done so, would have taken steps to prevent the harm, and that the defendant has failed to take reasonable steps. The onus is on the plaintiff to prove that steps taken, if any, were not reasonable.

[45] In as far as causation is concerned, the court has stated the following in *International Shipping*:¹³

'... in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a

¹¹ *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A-B.

¹² *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

¹³ *International Shipping* at 700E-701C.

hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation".'

[46] This means that the failure of the police to take certain steps must be the direct cause of the harm, and in order to determine this, the failure must be closely linked, in time and space, to the harm.

Analysis

[47] At the outset, I confirm that the evidence of the witnesses was correctly summarised by counsel and I do not have to repeat that exercise. Further, I found all three witnesses to be good witnesses, testifying to events as they remembered them. I am aware of the lapse of time since the events that they were testifying to, which all happened between 13 and 14 years ago. In addition, the cross-examination of the first plaintiff was not directed at challenging her evidence on the events of 24 October 2012.

[48] The cross-examination of the defendant's witnesses, on the other hand, was directed mostly at challenging what they knew about the toxicity of the relationship between Mr L[...] and Ms N[...], about her alleged unfitness to possess a firearm, and the steps they consequently took against what was recorded in their statements. Having considered the evidence of the police witnesses, I am not convinced that they fabricated the second meeting prior to the return of the firearm to Ms N[...]. The actions taken when they first learned of the incident of 24 October 2012 suggest that they appreciated the seriousness of the matter, even assisting Mr L[...] by serving the protection order on Ms N[...], who, having been dispossessed of her firearm, was also moved to another police station.

[49] It is necessary to reproduce the content of the protection order upon which the plaintiffs rely, as they state that such content ought to have triggered an inquiry into the fitness of Ms N[...] to be given her firearm back. It is written by Mr L[...] and states as follows:

'I was in a dating relationship with her for seven months. During August 2012 I told her that we must brake [break] up but she refused to do so.

On the 24th October 2012 the respondent came to my place of residence without my permission. She saw me with my other girlfriend. When I was talking with my girlfriend namely S[...] the respondent just cocked her gun wanted [wanting] to shoot me . I ran away she chased me with the gun. She was carrying the gun with her hand. I reported her to the captain. The captain talked to her. The respondent told the captain Mr Lamech that she will never do it again.

On the 25th October 2012 she also came to my place of residence. She pushed the door, my room door with her hands. She took out a gun from under her clothes. When she took out the gun I grabbed the gun. She failed to shoot me. I took the gun to the captain Mr Lamech. The gun is still with the captain.

On the 25th October 2012 after I took the gun away from her I asked her what she would do with the gun. She told me that she was going to shoot me and shoot herself. Now I am in fear for my life.

I want her to stop coming to my place of residence where I'm renting. I'm renting a room from Mrs Lightbody and I don't want her to contact me and to send S.M.S.'s to my cell phone. I don't want her to come near me. I want her to stop threatening to kill S[...], because on the 24th October 2012 she threatened to kill S[...] if S[...] does not break up with me.'

The protection order is dated 29 October 2012.

[50] It is apparent from a mere reading of this order that the incidents complained of are not the same as what was testified to by the first plaintiff, Col Lamech or Col Ngubane. Although Col Lamech is mentioned specifically in the order, he was not confronted with the version. This is also different to the version put to Col Lamech in cross-examination. Importantly, the main incident testified to by both the first plaintiff and Col Lamech is not part of the protection order.

[51] Col Lamech and Col Ngubane testified that the firearm was taken from Ms N[...] at the meeting on 25 October 2012. It was put to Col Lamech that he was given

the firearm by Sergeant Sokhela at the home of Mr L[...]. The protection order states Mr L[...] took the firearm from Ms N[...] and that he gave it to Col Lamech on 25 October 2012.

[52] In addition, it was put to Col Lamech that Sergeant Sokhela informed him he had heard the cocking of a firearm and had broken the door. This is not mentioned in the protection order, instead, what is mentioned is that the cocking of the firearm had taken place when Mr L[...] was with his girlfriend and Ms N[...] and that Ms N[...] had been chasing him with the firearm.

[53] In my view, given the above discrepancies, it was necessary for the colonels to be confronted with the specific paragraphs of the protection order that the plaintiffs rely on. It would be improper for me to draw the conclusion that the colonels, and by extension the Minister, knew about threats to shoot Mr L[...] that were only mentioned in the protection order. Even more so when they were not called upon to comment on those allegations.

[54] Mr *Ndlovu* complained about the failure of the defendant to call Sergeant Sokhela as a witness when his statement was prejudicial to the Minister and contradicted the evidence of Col Lamech. He suggested that this should go to the credibility of Col Lamech. The relevant part of such statement reads as follows:

‘(2) On 2012 at about 16H00 I was at Cst L[...]’s place with him. Whilst we were both talking I suddenly saw Cst F N[...] approach us. She asked permission to enter L[...]’s room. Cst L[...] refused and Cst F N[...] proceeded to the room without L[...]’s permission. L[...] followed her. (3) After a while I heard a cocking noise of a firearm which then quickly led me to quickly run inside. The door was locked and I broke the door and entered. They were both holding the fire-arm I interfered and managed to win the firearm in my possession and while I was busy calling my commander captain Lamech they were still continuing fighting. Captain Lamech he didn’t take too long to arrive. I told him what happened and handed over the firearm to him. Captain Lamech went inside the room and the fight stopped. He sat down with them and talked.’

[55] The defendant did not withhold the statement of Sergeant Sokhela, but did not call him as a witness. No reason was given for this failure. I do not agree that, having

disclosed the statement and its contents, the defendant had a duty to call him as a witness, given that it was not the party that bore the onus.

[56] The statement does not say that Sergeant Sokhela told Col Lamech about the firearm and about breaking the door down. It merely states 'I told him what happened and handed the firearm to him'. I have already highlighted that according to the protection order, it was Mr L[...], who, without the presence or intervention of Sergeant Sokhela, and on 25 October (as opposed to the 24th) handed the firearm to Col Lamech.

[57] I will repeat that the onus was on the plaintiff to prove that there existed circumstances that created a duty on the defendant to hold an inquiry, in terms of s 102 of the Act, into the fitness of Ms N[...] to possess a firearm. The plaintiffs placed reliance on the contents of the protection order, read with the statement of Sergeant Sokhela to prove their case.

[58] I accept without reservation that there exists a duty on the police to protect members of the public, and any person who is being threatened, against harm. The evidence that a firearm was taken from Ms N[,], that she was moved to another unit in another police station and that she was referred for counselling by Col Ngubane was not disputed. This action, in my view, shows that Col Ngubane appreciated that there was a threat of harm to Mr L[,], perpetuated by Ms N[.]. However, according to Col Ngubane, this appreciation stemmed from the incident of the previous evening that he had been informed of, and from Ms N[.] confirming that her actions were erratic because she was having great difficulty accepting the breakup and was, in fact, depressed. He did not know about the threats of killing and the pointing of a cocked firearm.

[59] In addition, Col Ngubane and Col Lamech received assurance from both Ms N[...] and Mr L[...] that they were no longer in any relationship, and they would stop all contact. This was not disputed and was cemented by Mr L[...] securing a protection order against Ms N[,], which was duly served by Col Lamech.

[60] Col Ngubane testified that he received medical confirmation that Ms N[...] had finished her treatment and was ready to resume duty in the TRT unit. This was six months after she had left and started treatment and counselling. His evidence was that prior to agreeing to her return, he convened a meeting which included Mr L [...], who agreed that he had no objections to her return, together with Col Lamech and Ms N[...].

[61] The evidence of Col Ngubane as to the procedure followed when s 102 of the Act was triggered could not be refuted. His evidence was that it was the police station that issued or enforced the protection order that would make the decision whether or not to hold an inquiry, and this only followed on the final protection order being granted. He had not known of the final protection order.

[62] I am not convinced that Col Ngubane, or indeed Col Lamech, on the information they had, and given the circumstances under which the firearm had been taken from Ms N[...], foresaw the possibility of harm to Mr L[...] when Ms N[...] returned to the TRT unit and was given the firearm.

[63] In my view, given that no complaints were reported between the time Ms N[...] was served with the protection order and when she shot Mr L [...], a year and six months later, a reasonable person in the position of Col Lamech and Col Ngubane would not have foreseen the possibility that Ms N[...] would harm Mr L[...]. From the common cause fact that Ms N[...] was pregnant through Mr L[...] at the time of the shooting, it is clear that Mr L[...] had been in contact with Ms N[...], despite having taken a protection order against her. The only reasonable conclusion that can be drawn from such conduct by Mr L[...] is that *he* did not consider Ms N[...] to be a threat to his life. How, then, could his superiors, whom he had informed that he was no longer in a relationship with Ms N[...], and to whom he never reported any complaint, think that Ms N[...] was a threat to Mr L[...]?

[64] While I agree with the principles set out in the case law referred to in this judgment, the overriding consideration is always that each case is decided on its own facts. In the present case, while the police have the general duty to protect persons against harm and threats to their rights, there was no indication that Mr L[...]

required protection against Ms N[...]. Beyond that, Mr L[...] himself lied to his superiors about a relationship with Ms N[...] and maintained contact with her in spite of the protection order he had taken against her.

[65] In my view, given that the conduct complained of is the failure to convene an inquiry into the fitness of Ms N[...] to possess a firearm prior to returning it to her, the plaintiffs have failed to prove that such inquiry was triggered in the circumstances. If the inquiry was not triggered, the defendant was not negligent in failing to hold one.

[66] More than that: if Ms N[...] had been cleared to return to the TRT unit by her doctor, and there had been no complaints at all about her conduct since she started treatment, it is highly unlikely that an inquiry would have yielded a negative result, ie that she was unfit to possess a firearm. I say this given Mr L[...]’s consent to her return to the same unit. Even then, Col Ngubane assigned Mr L[...] and Ms N[...] to different shifts in order to minimise contact between them.

Conclusion

[67] In the special circumstances of this case, there was a lapse of some 10 months between the return of the firearm to Ms N[...] and the shooting of Mr L[...], without any other complaints. None are mentioned in Sergeant Sokhela’s statement either, nor did the first plaintiff testify to any.

[68] It is my conclusion that even if an inquiry had been held prior to returning the firearm to Ms N[...], the shooting would still have occurred. This is because Mr L[...] supported Ms N[...]’s return to the unit that required her to have a firearm, and voluntarily kept up or resumed a relationship with Ms N[...] which was hidden from their superiors. The shooting was related directly to the hidden relationship between Ms N[...] and Mr L[...]. No action by the defendant would have prevented the killing of Mr L[...], as long as he voluntarily and secretly continued a relationship with Ms N[...]. The plaintiffs have failed to discharge their onus.

[69] While I am sympathetic to the plaintiffs for the loss they have suffered because of the death of Mr L[...], that is not a basis to find that the defendant is liable for their loss in these circumstances. I believe it was also sympathy that led the

defendant not to seek costs against the plaintiffs, and, instead, to seek that each party pay its own costs.

Order

[70] In the result, the following order issues:

The plaintiffs' action is dismissed, each party to bear its own costs.

SIBIYA J

APPEARANCES

Counsel for the Plaintiffs	: Mr T Ndlovu
Instructed by	: M.H. Mathonsi and Associates
Ref	: 01L026001/01L026002/01K102001
	mmathonsi@telkomsa.net
Counsel for Defendant	: Ms GM Mamvura
Instructed by	: Office of the State Attorney, KZN
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