



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 9105/2011

In the matter between:

THEMBELANI ISAAC PEHLANI

PLAINTIFF

And

THE MINISTER OF POLICE

DEFENDANT

Coram: ROGERS J

Heard: 8 SEPTEMBER 2014

Delivered: 25 SEPTEMBER 2014

JUDGMENT

ROGERS J:

Introduction

[1] I am asked to determine a separated issue in an action instituted by the plaintiff against the Minister of Police for damages following an incident on 18 January 2011 in which a Ms Nombuyiselo Petshwa ('Petshwa') fired a number of shots at the plaintiff, two of which struck him. The separated issue is whether the defendant is vicariously liable for Petshwa's conduct. Mr Filand appeared for the plaintiff and Mr Jaga for the Minister.

[2] No evidence was led on the separated issue. The parties stated a special case for adjudication. The summary which follows is extracted from the special case.

[3] The plaintiff and Petshwa were involved in an intimate relationship for several years until December 2010, when the plaintiff terminated it. Petshwa, who was at all material times a police reservist, made aggressive threats in an attempt to get the plaintiff to stay with her. On 6 January 2011 she threw petrol over him and tried to set him alight. On 15 and 16 January 2011 she sent him several emails which were at once emotional and threatening. In one of these she said that, if he did not return to her, she would book out a firearm and kill him.

[4] On 18 January 2011 Petshwa booked herself on beat duty for the period 09h45-18h00. For this purpose she was attired in a SAPS uniform and issued with a SAPS firearm, 15 rounds of ammunition and the other paraphernalia of a police officer. Her beat area was confined to the Cape Town Parade. Petshwa volunteered for duty on this date with the intention of being placed in possession of the firearm and ammunition and of shooting the plaintiff.

[5] Shortly after noon the plaintiff, who worked in the city centre, went to the Mr Price retail store in Adderley Street. This was not within Petshwa's beat area. While he was in the shop Petshwa, who had followed him, approached him and fired about six shots at him with her SAPS firearm. The first shot struck him on his right thumb. He tried to disarm her, whereupon she shot at him again and he was struck in the abdomen. The plaintiff then managed to dispossess her.

[6] The plaintiff sustained injuries for which he was hospitalised from 18 January to 12 March 2011.

[7] In the immediate aftermath of the shooting Petshwa falsely claimed that the plaintiff had attempted to rob her of her firearm, which led to her firing the shots. As a result the plaintiff was arrested and charged with robbery. When the true facts emerged, the charge was withdrawn and Petshwa was charged on two counts of attempted murder and one count of defeating the ends of justice. The one count of attempted murder related to the shots fired at the plaintiff, the other to a shot which hit a member of the public.

[8] Petshwa pleaded guilty and was convicted on 20 December 2011. The three counts were taken together for purposes of sentence. She was sentenced to eight years' imprisonment of which two years were suspended.

[9] Due to her unlawful conduct, Petshwa forfeited the cover afforded to SAPS members in terms of the National Treasury Regulations.

[10] The plaintiff did not, prior to the shooting, inform the police of Petshwa's threats or her attempt to set him alight. The defendant, through his officials, only learnt of these matters after the shooting.

[11] A police reservist performs voluntary duty in SAPS. In terms of SAPS Standing Orders, a police member may not leave his or her beat area except for certain stated purposes, none of which applied here.

[12] The parties agreed that, if the defendant was vicariously liable, the plaintiff's shooting was caused partly by Petshwa's fault and partly by the plaintiff's fault and that the defendant was to be liable for 70% of the plaintiff's damages (still to be proved). Given the parties' agreement, it is unnecessary to decide whether, in the

absence of agreement, such an apportionment would have been permissible or appropriate.¹

Statutory provisions

[13] In terms of s 205(3) of the Constitution, the objects of SAPS are to prevent, combat and investigate crime, maintain public order, protect and secure the country's inhabitants and their property and uphold and enforce the law.

[14] Although I was not referred in argument to the South African Police Service Act 68 of 1995 ('the SAPS Act') or the Firearms Control Act 60 of 2000 ('the Firearms Act'), there are certain provisions of those Acts which I should mention.

[15] Section 48(1) of the SAPS Act permits the National Commissioner of SAPS to determine the requirements for recruitment, resignation, training, ranks, promotion, duties and nature of service, discipline, uniform, equipment and conditions of service of members of the Reserve Police Service and any other matter which he or she deems necessary in order to establish and maintain different categories of members of the Reserve. In terms of s 48(6) a member of the Reserve is deemed to be in SAPS' employ 'while on duty', notwithstanding the fact that such member may not be remunerated by SAPS.

[16] The word 'member' is defined in s 1 of the SAPS Act to include, except for the purposes of any provision of the SAPS Act in respect of which the National Commissioner may otherwise determine, any member of the Reserve while such member is on duty. My attention was not directed to any relevant exception.

[17] An ordinary member of the public can only lawfully possess a firearm with an appropriate licence issued in terms of the Firearms Control Act 60 of 2000 (s 3). There are heavy penalties for contraventions of the Act (s 121 read with Schedule 4)

¹ Cf *Minister van Wet en Orde en 'n Andere v Ntsane* 1993 (1) SA 560 (A) at 570B-D and Neethling *et al* *Law of Delict* 6th Ed at 162. In response to my query, the Minister's counsel referred me to *Minister of Safety and Security v Venter & Another* 2011 (2) SACR 67 (SCA) but that was a conventional case of negligence on both sides rather than *dolus* on one side and *culpa* on the other.

– up to 15 years' imprisonment for unlicensed possession of a firearm or ammunition and up to 25 years in the case of an automatic firearm.

[18] Various public security agencies, including SAPS, are exempt from the requirements of the Firearms Control Act (s 96). In their case, the system of licensing which ordinarily applies is replaced by a system whereby permits are issued by the agency in question to its members (s 98). In the case of SAPS, the permit would be issued by the National Commissioner, as the head of SAPS, or by someone designated in writing by him or her (s 98(2)). In terms of s 98(4) the SAPS National Commissioner is empowered to impose conditions on the possession and use of SAPS firearms and ammunition and may issue instructions to SAPS members prescribing conditions relating to the acquisition, storage, transport, carrying, position, use and disposal of such firearms and ammunition.

[19] Section 98(5)(a) requires that, unless the permit indicates otherwise, the SAPS member must, when on duty, carry a handgun 'in a prescribed holster.' At the end of his or her period of duty the member must return the firearm to the designated place of storage (s 98(5)(b)).

[20] Section 98(8) of the Firearms Act states that a permit may only be issued under that section if the member 'is a fit and proper person' to possess a firearm and has successfully completed the prescribed training and prescribed test for the safe use of the firearm.

[21] Despite her deviant conduct, Petshwa was on duty as a reservist at the time of the shooting and was thus deemed to be in SAPS' employ. The parties' agreement that she was issued with a firearm when she came on duty necessarily implies that a permit was issued to her in terms of s 98 of the Firearms Act.

Vicarious liability

[22] The modern test for vicarious liability has been explained in several recent judgments of the Constitutional Court, in particular *K v Minister of Safety & Security* 2005 (6) SA 419 (CC) and *F v Minister of Safety & Security* 2012 (1) SA 536 (CC).

These cases emphasise that the normative considerations which underlie the imposition of vicarious liability cannot be ignored in formulating the test and applying it to the facts of particular cases. The main normative considerations in favour of vicarious liability are the desire to afford claimants efficacious remedies and the objective of encouraging employers to take active steps to prevent employees from causing harm to third parties (see the *K* case para 21).

[23] In terms of these cases, the general test that now applies where an employee has deviated from his or her authorised duties (an adaptation of the approach in *Minister of Police v Rabie* 1986 (1) SA 117 (A)) is the following: [a] If an employee is seeking, albeit improperly, to advance his or her employer's interests, the employer may be vicariously liable. This is a subjective test. On the subjective test there would be no vicarious liability if the employee were acting solely in his or her own interests. [b] Even if there is no vicarious liability on the subjective test, the employer may still be liable if objectively there is a sufficiently close link between the employee's act and the purposes and business of the employer (the *K* case para 44; the *F* case paras 49-50). It is the second of these tests that in particular allows a court to have regard to normative and policy considerations.

[24] Both the *K* and *F* cases concerned policemen who were guilty of rape. In both cases the Minister was held vicariously liable on the objective deviation test. In *K* the considerations that led (on the objective test) to vicarious liability were [a] that the policemen had a statutory and constitutional duty to prevent crime and protect the public; [b] that the policemen were on duty, were wearing uniforms and driving a marked police vehicle; [c] that they had offered to help the victim and that she had reposed trust in them by accepting their offer; [d] that the policemen's wrongful acts of commission (the rape) were accompanied simultaneously by omissions (a failure, in breach of their duties, to protect the victim).

[25] In the *F* case the grounds for liability were more tenuous but the Minister was still held vicariously liable. In *F* the policeman was not in uniform and his car, though a police vehicle, was unmarked. He was not on duty at the time and was thus not in uniform, but he was on standby duty. The court held that there was a sufficiently close connection between the policeman's act and the purposes and

business of his employer (the Minister). The policeman had had a constitutional duty to protect the victim. The vehicle, issued to him because he was on standby, enabled him to commit the crime. The complainant, a 13-year-old girl, had been a vulnerable person to whom the policeman had owed a duty of protection. His commission of the rape simultaneously involved an omission to protect the complainant. There was evidence that, by the time the complainant accepted a lift from the policeman on the second of two occasions that evening, she knew he was a policeman and reposed trust in him.

[26] I was referred in argument to a third judgment of the Constitutional Court, *Minister of Safety and Security v Luiters* 2007 (2) SA 106 (CC). In that case an off-duty police officer had shot the plaintiff with his SAPS firearm. The Minister was held vicariously liable on the basis of the subjective deviation test. Langa CJ, writing for a unanimous court, rejected an argument on behalf of the Minister that the test in *K* should be varied so as to preclude vicarious liability where an off-duty police officer, though subjectively intending to fulfil his or her duties, acted in a manner which was completely unrelated to the purposes for which the officer was employed (para 21). The argument was based on the supposed different levels of control exercised over on-duty and off-duty police officers. Langa CJ said that the degree of control did not necessarily differ but continued:

'[33] ... But even if this contention were correct, that alone would not in my view warrant a different level of scrutiny. While vicarious liability is not based on the employer's control over an employee, the level of control exercised by the employer will obviously be a relevant factor in determining whether there was a sufficiently close link between the conduct and the employment when considering the second stage of the *K* test. The level of control is therefore already a relevant consideration. It does not seem necessary or desirable to elevate it to the status of a decisive factor which determines the test that applies.

[34] It moreover seems to me that counsel for Mr Luiters is correct in suggesting that the variation to the rule, as suggested by the Minister, would have the effect of lessening the emphasis on the responsibility of the Minister to ensure that police officers are properly trained and carefully screened to avoid the risk that they will behave in a completely improper manner. What it would mean is that the more improper the conduct of the police officer, the less likely the Minister will be held liable. This result is not one that accords with a Constitution that seeks to render the exercise of public power accountable.'

Application of the law

[27] This is a deviation case. Counsel were agreed that the Minister could not be held vicariously liable on the subjective deviation test. Petshwa did not intend, when shooting the plaintiff, to advance the interests of SAPS in any way.

[28] As to the objective deviation test, Mr Jaga sought to distinguish *K* and *F*, primarily on the basis that in the present case there was no question of the plaintiff having reposed trust in Petshwa in her capacity as a police reservist. However, *K* and *F* are not authority for the proposition that any particular factors need to be present before the Minister can be held liable for the wrongful act of a police official. The ultimate question, on the objective deviation test, is whether the deviant conduct is 'sufficiently connected to the employer's enterprise', the answer to which in any given case must be approached 'with the spirit, purpose and objects of the Constitution in mind'. The test is 'sufficiently flexible to incorporate not only constitutional norms, but other norms as well' (*K* para 44).

[29] In certain circumstances the fact that a victim reposed trust in a police official will be an important circumstance in determining whether the latter's deviant conduct was 'sufficiently connected' with police business to justify the imposition of vicarious liability. Although the element of trust was mentioned in both *K* and *F*, it was not necessary in either case for the court to decide whether, if this element had been absent, vicarious liability would still have been warranted. In each case there were other circumstances in favour of vicarious liability. The element of trust may perhaps have been more critical to the outcome of *F* than *K*, given that in *F* the delinquent policeman was not on duty.

[30] The significance of trust, as a connecting factor between deviant conduct and SAPS business in cases such as *F* and *K*, seems to me to be that it forges a causal link between the wrongdoer's position as a police official and the wrongful act. The factual finding in each case appears to have been that the complainant would not have got into the vehicle but for the trust which the complainant reposed in the police official. And if the complainant had not got into the vehicle, she would not or might not have been raped. It is unnecessary to decide whether, in cases such as *F*

and *K*, vicarious liability depends on showing that the rape would probably not have occurred but for the fact that the complainant reposed trust in the delinquent police official. It may perhaps be sufficient that the complainant's trust facilitated the perpetration of the rape even though the wrongdoer would, in the absence of trust, probably have forced the complainant into his vehicle in any event.

[31] In the present case there is no question of trust in the sense contemplated in *F* and *K*. Petshwa took the plaintiff by surprise. However, trust of that kind is not, in the circumstances of the present case, a prerequisite for forging a sufficiently close connection between the wrongful conduct and SAPS business. Petshwa was on duty and in uniform. That she chose to place herself on duty to facilitate the crime does not detract from the fact that she was, at the relevant time, a police reservist on duty. While on duty she had all the duties of a police officer, including importantly the duty to protect members of the public from crime. Not only did she fail to do so; she used her official firearm in her attempt to murder the plaintiff. Furthermore, and while she was on duty, she was subject to the control of the Minister through those officers who had command of Petshwa.

[32] The fact that Petshwa used a SAPS firearm to shoot the plaintiff is, in my view, a particularly weighty factor in the conclusion that there was a sufficiently close connection between her wrongful conduct and SAPS business. In *K* and *F* the wrongdoers used police vehicles to facilitate their crimes. The vehicles were, however, only an indirect aid to the perpetration of the rapes, hence the significance of other factors. Here, by contrast, the firearm was the very means by which the crime was committed. Of all the accoutrement of police office, the firearm is the most obviously and immediately dangerous. The normative values underlying the imposition of vicarious liability would be served by acknowledging the risk created for members of the public when police officials are placed in possession of dangerous weapons and by encouraging strict official control over the issuing of firearms to police officials. This does not mean, of course, that vicarious liability is dependent on whether or not the Minister or his officials were negligent in issuing the firearm to the particular official; if such negligence were shown, SAPS would be held liable on account of such negligence and it would be unnecessary to determine whether the Minister was vicariously liable for the intentional wrongdoing of the

shooter. What vicarious liability achieves is to contribute to a culture of strict control of a risk-creating activity.

[33] The fact that trust by a victim in the delinquent officer is not a prerequisite for vicarious liability is illustrated by the judgment of the Supreme Court of Appeal in *Minister of Defence v Von Benecke* 2013 (2) SA 361 (SCA). The plaintiff suffered gunshot injuries during the course of an armed robbery. A member of the defence force, one Motaung, whose responsibilities included the safekeeping and storage of weapons, stole various rifle parts and ammunition and supplied them to the robbers. The Minister of Defence was held vicariously liable on the objective deviation test even though the plaintiff obviously did not repose trust in the robbers or in Motaung, of whom he had probably never heard. The element of trust was also absent in *Rabie supra*, where the emphasis was placed on the risk created by the State in appointing the delinquent person as a member of the force and thus clothing him with the powers of a police officer (at 134D-135B). And see also *Ramango & Another v Mashamba & Others* [2013] ZAGPPHC 418, a case in which the Minister was held liable where an off-duty police officer shot and killed his former wife with his SAPS firearm.

[34] Although trust of the kind contemplated in *K* and *F* (ie individual trust by the victim) is not a factor in the present case, trust in a broader sense cannot be discounted. A member of the public who walks around displaying a firearm is likely to attract attention. The firearm would have to be completely covered in a holster (s 84 of the Firearms Act). Law enforcement officials could well ask the person to produce his or her license to possess the firearm (s 107 read with s 3 of the same Act). However, members of the community, other law enforcement officers and private security officials know that SAPS members are generally entitled to bear arms and trust SAPS members to use them lawfully and only when necessary. Petshwa, in walking about in the city with a firearm, was, by virtue of her office and uniform, given a freedom of movement she might not have expected to enjoy if she had been off duty and in civilian clothes.

[35] For these reasons I consider that the Minister is, on the objective deviation test, vicariously liable for Petshwa's conduct.

Conclusion

[36] it follows from my finding and from the parties' agreement that the Minister must be declared liable for 70% of the plaintiff's damages as agreed or proved.

[37] This matter was originally enrolled for hearing on 28 August 2014. I was told that the matter did not proceed on that date because the Judge-President's secretary did not receive from the plaintiff's legal representative the notification required by para 2 of Practice Note 42 and thus did not allocate the case. Mr Filand informed me, and Mr Jaga did not dispute, that he filed a written practice note at the general filing office on 26 August 2014 at a time when the court file had not yet been sent to the Judge-President. The relevant paragraph in the Practice Note does not require the note to be 'delivered' or 'filed'; what the plaintiff's legal representative must do is to advise the Judge-President's secretary of certain matters. This can be done by fax or email.

[38] I do not know whether Mr Filand's practice note was in the court file when it was delivered to the Judge-President's office. What is clear, though, is that, if the plaintiff's counsel or attorney had complied with the terms of the Practice Note by communicating in writing with the Judge-President's secretary rather than delivering a document to the general filing office, the matter would have been allocated.

[39] It is unfortunate that there was a postponement, given the diligent manner in which Mr Filand has conducted the case. Nevertheless, I am bound to find that the postponement was brought about by the plaintiff's failure to comply strictly with the relevant Practice Note. The plaintiff must thus bear the wasted costs of 28 August 2014. Whether those costs will amount to anything will depend on whether the defendant's counsel elects to charge a refresher fee for the wasted day.

[40] I make the following order:

(a) The defendant is liable for 70% of the plaintiff's damages, as agreed or proved, suffered in consequence of the shooting alleged in the particulars of claim.

(b) The defendant is ordered to pay the plaintiff's costs associated with the determination of the separated issue, save that the plaintiff shall pay the defendant's wasted costs (if any) of the postponement on 28 August 2014.

ROGERS J

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