NORTH GAUTENG HIGH COURT

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case no: 6961/09

11/10/2013

~~10/10~~/2013

In the matter between:

CHARLOTTE PIETERSE	**FIRST PLAINTIFF**
JOHAN PIETERSE	**SECOND PLAINTIFF**
HENDRIK THOMAS MULLER PRETORIUS	**THIRD PLAINTIFF**

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

11/10/2013 ....

AND

THE MINISTER OF DEFENCE	**FIRST DEFENDANT**
JUNK METALS CC	**SECOND DEFENDANT**
JACOBUS GERHARDUS VAN DER MERWE	**THIRD DEFENDANT**

JUDGMENT

BAQWA J

[1] This is a claim for damages for injuries suffered by the plaintiffs as a result of an explosion that occurred on the morning of 30 May 2007 at the premises of second and third defendants.

[2] The first plaintiff and second defendant are husband and wife whilst the third plaintiff is the son of first plaintiff.

[3] First defendant is the Minister of Defence who is sued in this matter in his capacity as such. More particularly, he is cited on the basis that the device which caused the explosion on 30 May 2007 was issued by the South African Defence Force.

[4] Second and third defendants are the owners of the business premises situated at Plot 84, corner Rentia and Soutpan Road, Bonaccord Pretoria where the explosion occurred.

[5] Third defendant a member of the second defendant together with one Annadale who is however not participating in this action.

Background

[6] The basis of the claims by plaintiffs is the explosion of an explosive device on 30 May 2007 which occurred at the premises of the second defendant. The third defendant who is a member of the second defendant, a scrap metal dealer, was in the process of selling scrap metal to the plaintiffs when first plaintiff pointed out that third defendant was in possession of material which could cause danger to other persons, namely, unexploded devices.

[7] Third defendant responded by throwing a device on the ground to demonstrate that it was safe upon which the device exploded causing injuries to the plaintiffs and fatally wounding Mr Zungu, one of the third defendant's employees.

[8] The plaintiffs allege that the device that exploded was Defence Force equipment. There is a dispute in this regard between the parties.

[9] The device which exploded originated from the Mosita area, which was previously used by the first defendant for the training of its troops including mortar training and training with live ammunition. This is common cause between the parties.

[10] It is the plaintiff's case that the defendants were negligent or alternatively in breach of a legal duty of care towards the plaintiffs by not deactivating such a device and allowing such a device to be available to the general public. By so doing they had failed to ensure the safety of the public and more particularly the plaintiffs.

[11] The parties agreed to separate the merits and quantum in terms of Rule 33(4) of the Uniform Rules of Court and I am called upon to decide the merits at this stage.

Pleadings

[12] The first defendant raised two special pleas, the first being the issue of non-joinder of the South African Police Service and the second being non-compliance with the provisions of section 3(1) of Act 40 of 2002. The first special plea has since been abandoned and the second special plea was resolved by a court order in favour of the plaintiffs.

[13] Plaintiffs obtained a court order on 10 November 2011 declaring plaintiffs to have complied with the provisions of Act 40 0f 2002.

[14] On the merits, first defendant pleaded that prior to vacating the Mosita area, first defendant caused the area to be 'swept' and deactivated of any explosives on 20 June 1997 and took precautionary measures by placing warning boards in the Mosita area. First defendant denies any legal duty of care or any breach of such duty. Further first defendant denies any negligence, unlawful conduct or causal link between its conduct and damages suffered by plaintiffs.

[15] No appearance to defend was entered by second defendant and no special plea was raised by the third defendant. Third defendant simply denies any negligence, duty of care or breach of any legal duty.

[16] At the beginning of the trial first defendant sought to withdraw some of the admissions regarding facts which had been agreed to be common cause but this was later abandoned.

Issues to be decided

[17] The main issues to be decided are the following:

17.1. Whether the explosive device which caused the explosion was defence force equipment.

17.2. Whether first defendant had a duty to ensure the safety of the public in relation to that device.

17.3. Whether he was in breach of that duty.

17.4. Whether third defendant was negligent in possession material which could cause danger to the public and in throwing a device to the ground and causing an explosion.

[18] At the beginning of the trial the plaintiffs and the first defendant agreed facts which are common cause between them. These were recorded in the form of admissions which were handed into court as an exhibit. Though third defendant had initially not been party to this agreement he later joined issue with the other parties and agreed to the correctness of the common cause facts subject to a few qualifications.

[19] Because of the significance of the common cause statement admitted as exhibit "A" in this trial I set it out fully hereunder.

19.1. The identity and ***locus standi*** *of the parties, including the identity numbers of the plaintiffs.*

19.2. The above Honourable Court has jurisdiction to adjudicate this action

19.3. The South African Defence Force ("SANDF") occupied the Mosita Training Area from approximately 1968 to 1997.

19.4. The SANDF used the Mosita Area for the training of its troops, which included mortar training and training with live ammunition.

19.5. The Mosita Area occupied by the SANDF is about 4750ha in extent, and 60km from the border of Botswana, in the Vryburg district.

19.6. The Mosita Area was occupied and used by two platoons, i.e Group 21 based at Vryburg and 2SA Infantry Battalion, based at Pomfret, which platoons also patrolled 250km of the Botswana border.

19.7. The Mosita Area had, on the 17th of September 1968, been expropriated by the then Minister of Agriculture in terms of Section 13(2) of Development Trust and Land Act, no 18 of 1936, which land was made available to the SANDF.

19.8. The area, which was, at one time, a subject of a land restitution claim by the Barolong-ba-Mosita tribe, was handed back to the Department of Public Works (as the custodian of all state assets), on the 13th of November 1997.

19.9. On the 15th of October 1998 the Land Claims Court ordered that the State shall restore the Mosita Area, being Mosita Native Reserve 251IN, North West Province, to the Mosita Community.

19.10. The Mosita Area was transferred to the Mosita Communal Property Association on the 12th of September 2008.

19.11. On the 30th of May 2007, the plaintiffs visited the said business premises of the second and third defendants, being traded as a scrap yard, to purchase dirty aluminium from second defendant.

19.12. The first plaintiff warned the third defendant that the metal the third defendant was showing to the first and second plaintiffs was explosive devices, and that such devices were dangerous, and should not and could not be sold by the second defendant.

19.13. The third defendant replied to say it was safe as it had been deactivated. The third defendant threw it to the ground to demonstrate that it was safe. The said device exploded when it hit the ground.

19.14. The plaintiffs were injured due to the exploding of this explosive device.

19.15. The third defendant, representing the second defendant, purchased the device that exploded from Obakeng John Mongale who together with the third defendant collected the device that exploded together with other material from the Mosita Area.

19.16. The said explosive device was a prohibited firearm and may not be possessed or licensed in accordance with the provision of section 4 of the Firearms Control Act, Act 60 of 2000.

19.17. The third defendant and Mr Mongale were not in possession of any licence or permit to possess same.

19.18. Consequently, the third defendant and Mongale were in unlawful possession of the explosive device in contravention of section 3 of Act 60 of 2000.

19.20. On the 14th of February 2010, the Magistrate sitting at Pretoria North found, in an inquest, that death of the deceased was brought about by an act or omission ***prima facie*** *involving or amounting to an offence on the part of third defendant.*

19.21. The minutes of a meeting held on the 12th of September 2000, as contained in the letter dated the 13th of March 2001, and which was attached to the first defendant's provisional answer to the plaintiff's request in terms of Rue 35(3) correctly reflect the events at the meeting of the 12th of September 2000.

Evidence

[20] Among the witnesses called by plaintiffs was Mr Deon Sydney Stidwell who works as a consultant in the mining industry.

[21] Mr Stidwell was previously employed as a captain in the South African Police Services. More specifically he was employed at the Forensic Sciences Laboratory, Explosive Unit, Pretoria.

[22] At the time of the incident namely, 30 May 2007 he was an Inspector of Explosives in terms of section 2(5) of Act 26 of 1956.

[23] He attended the premises of the second defendant as an employee of the SAPS shortly after the incident. He inspected the premises and investigated the scene where the incident occurred, the items present at the premises as well as the point of detonation and shrapnel present at the scene.

[24] He instructed Inspector G.C Van Eden to photograph the scene. He also identified several items present at the premises including 40mm and other casings, 37mm stopper rounds, remnants of mortars, rocket propelled grenades (RPG7), tail fins of mortars, thunder flashes, 60mm practice mortars, illuminating mortars and 68mm rockets including remnants of these items.

[25] Mr Stidwell further testified that he was involved in the investigation by the SAPS of the death of Mr Johannes Zungu who died as a result of the explosion and submitted statements in that regard. He was however not

involved in the autopsy though he later obtained pieces of shrapnel retrieved from the deceased's body.

[26] He testified that taking into account the measurements of the point of detonation, the marks surrounding the point of detonation, the shrapnel removed from the deceased, the shrapnel found at the scene, and the intensity of detonation, he is of the opinion that the incident was caused by the detonation of a high explosive weapon, probably a 40mm round of a rifle launcher. He identifies these items as Defence Force equipment.

[27] Mr Stidwell describes a 40mm round as a mini grenade launched from a launch pipe containing about 45 grams of TNT/RDX high explosives. He stated that whilst the 40mm round is intended to explode on impact causing extensive damage, this may not happen due to factors like soft landing, mechanical failure or incorrect aiming and manufacturing faults.

He further described it as weapon capable of disabling or killing and destroying any equipment in the vicinity of detonation.

[28] In his opinion the second and/or third defendants should not have been in possession of the said Defence Force equipment as this is in contravention of the Firearms Control Act 60 of 2000.

[29] Mr Stidwell further testified how he visited the Mosita area, accompanied by the plaintiffs attorney on 28 February 2012. He spent about three hours in the area which is now being used as residential area and for cattle farming.

[30] They had discussions with residents and herdsmen. It was clear from their engagement that the residents were aware of the danger in the Mosita area and that it was previously used by the Defence Force for training purposes. They were also aware of the existence and dangers of unexploded ordinance (UXOs)

[31] On a rocky area Mr Stidwell recovered a 60mm practice mortar under a tree. He further testified that when high explosives mortars are fired, most, but not all of them would explode. They searched the area in the vicinity for more UXO's and found various tail fins and some pieces and remnants of exploded mortars.

[32] The search was conducted without any equipment for searching for UXO's. He is of the opinion, however, that should more people trained in the searching for UXO's and using the necessary equipment to search the Mosita area, it is more than likely that more UXO's would be found.

[33] Mr Stidwell testified that nothing would have prevented them from entering Mosita or from removing UXO's as the area was like an open veld.

[34] He is of the view that the removal of UXO's should be conducted according to internationally accepted standards such as the International Mine Action Standards (IMAS) and Internal Standards of the Defence Force. He commented on the evidence by members of the Defence Force that a one day sweeping of the ground surface of the Mosita area by troops was woefully inadequate for purposes of removing UXOs.

[35] He also testified that he did not see any boards, warning boards or any other indications or signs, warning any person at the area of the existence of UXO's.

[36] Mr Stidwell concluded by stating that in his opinion the Mosita area is a highly dangerous area and that there is a high probability of further incidents involving explosions of the UXOs in the area.

[37] Mrs Charlotte Pieterse, the first plaintiff gave evidence for herself and the other two plaintiffs. Her account is by and large reflective of the background summary given (supra) as to the circumstances surrounding the explosion.

For the first plaintiff, this was clearly a life changing experience not only because her entire family was nearly wiped out but also at a personal level. She is now in separation from her husband and financially she barely ekes out a living. She testifies that her personality has changed. Despite these unfortunate consequences she gave testimony that was both coherent and credible.

[38] Further testimony was presented on behalf of the plaintiffs by Colonel Ferreira, a Senior Staff Munitions Officer, Munitions and Department of Defence (DOD) Explosives Manager.

[39] According to Ferreira, once the Mosita farm was transferred to the Mosita community it was no longer the responsibility of the DOD. The South African Police Service (SAPS), became the department responsible for securing the area. DOD would however readily avail itself to assist in sweeping the area whenever requested to do so by SAPS.

[40] Colonel Fereirra had never seen records regarding any sweeping exercise though he was aware of correspondence in that regard. He stated that the

sweeping exercise was not conducted in terms of any law or Standards at the time. It was the duty of the Commander responsible for the training exercise or area to ensure that it was performed in terms of a duty of care owed by the DOD.

[41] He testified that the Mosita area was used by the infantry, including the Motorised Infantry who used ammunition, small arms, grenades, rifle grenades and mortars for training. They also used high explosive rounds, illuminating ammunition, smoke ammunition and practice ammunition during the training.

[42] Regarding Stidwell's testimony, he could neither deny nor confirm the cause of the explosion stating that he could not do so by mere observation of photographic material.

[43] As far as the presence of UXOs in the Mosita Area is concerned, the evidence of Colonel Ferreira and Captain Nel by and large corroborated that of Mr Stidwell.

[44] Captain Nel is a Bomb Technician at the Bomb Disposal Unit, Upington. He was acquainted with the Mosita area whilst stationed at the SAPS Vryburg. He had been called out to the area during the period 2002 to 2008 to destroy unexploded ordnance discovered by the residents and farmers.

[45] Colonel Gaosale was the DOD member responsible for sweeping the Mosita area in the year 2000 after it had been handed over to the Mosita Community. Accompanied by 83 members of the Defence Force Colonel Gaosale who was a Major at the time, conducted a sweeping exercise lasting

about three hours covering an area of about one and half by three kilometres. There is no evidence of any further sweeping exercise thereafter.

[46] The plaintiffs closed their case after the evidence summarised above. First defendant did not tender any evidence and closed its case. Third defendant gave evidence in which he denied any negligence regarding his purchase of military debris from private individuals in the Mosita area. He testified that he considered himself entitled to deal with the material he purchased in terms of his scrap dealer's licence.

[47] He further expressed the view that it was the first defendant who should be held vicariously liable for the negligent acts of its forces in either not clearing the Mosita area of unexploded ordnance despite the knowledge that people were resident in that area.

[48] I proceed to deal first with the case of the third defendant. It is common cause that on 30 May 2007, the plaintiffs visited the second and third defendant's business premises which was used for their scrap metal dealing business to purchase dirty aluminium from the second defendant.

[49] It is further common cause that the first plaintiff warned third defendant that the debris the third defendant was showing to the plaintiffs was explosive devices and that such devices were dangerous material which should not be sold by third defendant.

[50] Third defendant responded by saying that the material was safe as it had been deactivated. He picked an item, from the debris and threw it on the ground to demonstrate it was safe. The explosion occurred.

Third defendant was cross examined at length by both counsel for the plaintiffs, Advocate Hartman and for the first respondent, Advocate Maritz S.C in this regard. His refrain was that he had trust in the SANDF that they would not have left any unexploded ordnance in an area where people now reside.

This, to me, is an inadequate and superficial response to try and explain a series of actions which were reckless in the extreme.

[51] Third respondent had no licence to trade in armaments or unexploded ordnance. He acquired material which he simply assumed to be safe from a former military training ground. Third defendant was a former member of the South African Defence Force. Even if he had not undergone any infantry training, he ought to have been aware of the inherent danger in the material he acquired. Yet he took absolutely no steps to verify its safety be it from the DOD or the SAPS. Instead he simply threw the ammunition to the ground which turned out to be a 40mm round, with fatal consequences. Third defendant acted without due care to persons around them and this in my view amounts to gross negligence on his part.

The question of gross negligence has been described as follows in the matter of **Transnet Ltd T/A Portnet v Owners of the MV Stella Tingas and Another 2003(2)SA 473(SCA) at 480**:

*"Gross negligence is not an exact concept capable of precise definition. Despite **dicta** which sometimes seem to suggest the contrary, what is now clear, following the decision of this court in **S v Van Zyl 1969(1) SA 553(A)**, is that it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. (See also **Philotex (Pty) Ltd and Others v***

Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others 1998(2) SA 138 (SCA) at 143C-J.). *This must be so. If consciously taking a risk is reasonable there will be no negligence at all. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. (**Van Zyl's** case supra at 557A-E). If, of course, the risk of harm is foreseen and the person in question acts recklessly or indifferently as to whether it ensues or not, the conduct will amount to recklessness in the narrow sense, in other words, **dolus eventualis;** but it would then exceed the bounds of our modern-day understanding of gross negligence. On the other hand, even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence (**Van Zyl**'s case supra at 559D-H).''*

[52] Regarding the first defendant, when it took over the Mosita community area and used it as a training ground in 1968 it introduced a new source of danger into an area which had been a normal residential area. The new source of danger was in the form of UXOs or unexploded ordnance.

It accordingly assumed accountability to ensure that not only its employees but also the general public would not to be exposed to harm as a result of that new source of danger. The first defendant cannot simply walk away from this responsibility and point to other persons or departments as the accountable persons or entities. Introducing a new source of danger creates a legal duty for first defendant.

[54] The danger existed from the possibility of members of the public picking up UXOs and possessing them for whatever reason unaware that they could possibly explode. First defendant was clearly aware of this danger hence the

purported 'sweep' of the area in 1997 which however was not proved to have taken place.

Colonel Gaosale confirms a "sweep" on 11 September 2000 which Stidwell describes as wholly inadequate. Counsel for the plaintiffs submits and I accept that first defendant did not act in a manner sufficient to protect the South African public by conducting an inadequate "sweep" and that their omission amounts to negligence.

Vicarious liability

[55] The duty that lies upon first defendant's shoulders was eloquently described in the case of **Von Beneke v Minister of Defence 2012(5)SA 225GNP 225 at 228 [paragraph 14-15]** where my brother, Mr Justice Tuchten pronounces as follows:

"[14] Section 200(2) of the Constitution provides:

'the primary object of the defence force is to defend and protect the Republic, its territorial intergrity and its people in accordance with the constitution and principles of international law regulating the use of force.'

This provision is replicated in s2(b) of the Defence Act 42 of 2002. Section2(g) of the Defence Act provides that the defence force must respect the fundamental rights and dignity of its members and the public. One of the important fundamental rights engaged by s2(g) of the Defence Act is the right of everyone, enshrined in s12(1)(c) of the Constitution, to be free of all forms of violence from either public or private sources. Section 2 of the Defence Act provides that the Minister of Defence, any organ of state as defined in s239 of the Constitution, as well as all members of the Defence force and any auxiliary service and employees, must, in exercising any power or performing

any duty in terms of the Defence Act, have regard to the principles articulated in the section.

[15] The business of the defendant is not merely to wage war when duly called upon to do so. No less is it the constitutionally mandated business of the defendant to see to it that the members of the defence force do not use their training and access to weapons against their own people, and to see to it that its engines of destruction are used only for constitutional purposes. It thus follows, in my view, that, at the factual level, it was certainly foreseeable by the defendant that the people of South Africa could suffer harm if the weapons of the defence force at the 4th SA Infantry base at Middelburg were not properly preserved, or deliberately placed in the hands of criminals. To the extent that public policy plays any part in the present enquiry, I respectfully adopt the reasoning in ***Van Eeden*** *at para 19: 'in circumstances such as the present ... there is no other practical and effective remedy available to the victim of violent crime.' So, even if foreseeability is an issue in this context, its existence has been established."*

[56] Counsel for first defendant submits that this case should be distinguished from the **Von Beneke** case as that case dealt primarily with vicarious liability. I do not agree. To the extent that the victim was injured with defence force equipment which had been stolen, the case might seem distinguishable but in both the present case and the **Beneke** case, defence force equipment had ended up in the hands of persons who were not members of the DOD. They used the equipment to cause harm to members of the public. It can therefore hardly be argued that first defendant is not vicariously liable for the omission of defence force members who failed to take the necessary reasonable actions to protect innocent civilians.

[57] The relationship between the defence force and its employees and the public was articulated by the SCA in

Minister of Defence v Von Benecke (115/12) 2012 ZASCA 158 (15 November 2012) [paragraph 24] as follows:

"The defence force is in this statutory context, a special kind of employer with a relationship towards its employees and the public which requires an approach to liability for the wrongful acts of those employees which is very different from that of an ordinary civilian employer. Its proper functioning requires it to possess quantities of dangerous weapons which cannot be permitted to escape into the hands of the public and, especially, the criminal element of the population, and it has the resources to prevent that happening and the powers necessary to do so. It has the duty to educate its employees in the disciplines required to minimise that risk. It goes without saying that because of the enormous potential for public harm inherent in the adequate preservation and control of the arms the Department (through its responsible Minister) should not in general be able to avoid liability for wrongful acts of commission or omission of employees that it has appointed to carry out its duties to preserve and control its arms, save in cases where the court finds that those acts are not sufficiently closely connected with the employee's duties to warrant the imposition of liability on the Department."

[58] Counsel for first defendant has attempted to persuade me that there is no causal link established between the delict of third defendant committed against the plaintiffs and the omissions of the defence force in the Mosita area. I do not accept that proposition. There is a direct and foreseeable connection. Third defendant, acting in collaboration with one Mongale and certain members of the Mosita community removed what appeared to be debris but which in fact contained UXOs for commercial purposes. The conduct of third defendant was linked to the harm sufficiently closely or directly for legal liability to ensue.

See Minister of Police v Skosana 1977(1)SA 31(A) at 34G

Legal duty to avoid negligently causing harm

[59] First defendant was under a legal duty to protect members of the public from harm. The SCA pronounced on this matter in the matter of Van **Eeden v Minster of Safety and Security (Women's Legal Centre Trust, as amicus curiae) 2003(1) SA 389 (SCA)** at paragraph 9 the following is stated:

"[9]Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, inter alia, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered.

See the judgment of this court in ***Carmichele at para [7] and recent decisions of this court in Cape Town Municipality v Bakkerud 2000(3) SA 1049 (SCA) paras [14]-[17]; Cape Metropolitan Council v B Graham 2001(1) SA 1197(SCA) para[6]; Olitzki Propery Holdings v State Tender Board and Another 2001(3) SA1247(SCA) paras [11] and [31]; BOE Bank Ltd v Ries 2002(2) SA39(SCA) para[13] and the unreported judgment of this court in Minister of Safety and Security v Van Duivenboden, case no 209/2001 delivered on 22 August 2002 para[16].***"

Both the first and third defendants failed to discharge this legal duty. First defendant omitted or failed to render the Mosita area safe or harmless for use by members of the public. Third defendant failed to make the necessary inquiries be it from the DOD or SAPS regarding unexploded ordnance from Mosita before sending his 8 ton truck to remove it from the area.

[60] In the circumstances, taking into account the conspectus of facts and the law I have come to the conclusion that the plaintiffs have succeeded to prove their case against all the defendants.

[61] I accordingly make the following order:

61.1. It is declared that the defendants, jointly and severally, are liable to the plaintiffs for such damages as the plaintiffs may be able to prove arising from the explosion that occurred on 30 May 2007.

61.2. The issue of quantum of damages is postponed **sine die.**

61.3. The defendants, jointly and severally must pay the costs of the plaintiffs, including the costs of the expert Mr Stidwell. Costs will also include costs occasioned by the two special pleas pleaded by the first defendant.

S.A.M BAQWA

(JUDGE OF THE HIGH COURT)

Counsel for the plaintiffs:	Adv N.C Hartman
Instructed by:	Vorster and Brandt Inc
Counsel for the first respondent:	Adv SJ Maritz S.C.
	Adv DM Mohlomonyane
Instructed by:	The State Attorney

Third respondent appeared in person