IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 36972 / 2017

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

15 / 01 / 2020
DATE

SIGNATURE

In the matter between:

PORTIA MATHIBELA — PLAINTIFF

And

THE MINISTER OF POLICE — [redacted]ENDANT

JUDGMENT

Mavundla, J.

[1] The plaintiff is an adult female residing at Winterveldt, Gauteng Province. She sued the defendant for damages she allegedly suffered in an amount of R4, 000, 000, 00 (four million rand) as the result of being unlawfully shot by one Mr Seloane, who at the relevant time was a member of and in the employ of the South African Police Service, but was off duty, on 16 July 2016. It is common cause that the handgun used in the shooting incident was Sealoane's SAPS issued, in respect of which he had been issued with a temporary firearm licence.

[2] It needs mentioning that, by agreement between the parties, the issue of *quantum* was separated from the merits in terms of rule 33(4) and postponed *sine die*. The only issue to be determined in the merits, is the question of liability, in particular, whether the defendant can be held vicariously liable for the actions of Seloane, in shooting the plaintiff: (i) at a private function; (ii) when he was not in uniform; (iii) travelling in his own motor vehicle; (iv) not on duty; (v) pursuing his own interest (on his own frolic); (vi) having deviated from the generally accepted norm.

[3] It is common cause that on the relevant date of the shooting incident, there was a family party or function in progress at the family home. Seloane suspected the plaintiff of having a romantic relationship with a certain gentleman who had also attended the party. An argument ensued between the plaintiff and Seloane. This resulted in Seloane shooting the aforesaid gentleman and the plaintiff. He fired several shots at and which hit both the said gentleman and the plaintiff. Seloane eventually loaded the plaintiff into his vehicle and rushed her to the hospital, where she was treated. Luckily the injuries sustained by the plaintiff were not fatal. Seloane was eventually arrested and charged with two counts of attempted murder, for which he was duly convicted. *In casu*, it is common cause that Seloane when he shot at the plaintiff he wanted to kill her.

[4] The respective counsel for the parties are *ad idem* that the test for vicarious liability was as enunciated and developed in the following authorities: *Rabie v Minster of Police;*[1] *K v Minster of Safety and Security*[2] and *F v Minister of Safety and Security,*[3] namely, a two stage enquiry for the imposition of vicarious liability in the so called deviation cases. Deviation is a matter where: firstly, subjectively speaking the wrongdoer was not on his master's business and therefore did not create a vicarious link, having regard to these subjective considerations of the wrongdoer. Secondly, the state of enquiry is whether, objectively speaking, there is a sufficiently close link between the employer's conduct and

[1] 1986 (1) SA 117 (A);
[2] 2005 (6) SA 419 (CC).
[3] 2012 (1) SA 536 (CC) at [40]-[49];

the business of the employer. At this stage of enquiry various factors and considerations should be weighed as was formulated in K and F, vide preceding pargraph.

[5] It was submitted on behalf of the defendant that:

5.1 *in casu*, the shooting could not have been foreseen by the defendant or its functionaries in issuing Seloane with a firearm, relying, *inter alia*, on the decision in the matter of *Booysen v Minster of Safety and Security*[4], because the shooting took place in a domestic lover's setting where Seloane and plaintiff were not relating to each other as police officers and citizen; the plaintiff never reposed trust in Seloane due to his employment as a police reservists with SAPS; there was no evidence that Seloane acted as a police officer, nor was there evidence that when he was issued with the firearm, the management of SAPS was aware or should have been aware that this created a material risk of harm to the community, in particular to the plaintiff, his girlfriend.

5.2 In the matter of *Minister of Safety and Security v Nancy Msi*[5] the Supreme Court of Appeal cited its judgment in the *Booysen* matter where the Supreme Court of Appeal held that:

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

[6] In the matter of *Minister of Police v Rabie*[6] the Supreme Court of Appeal held that:

> "it seems that an act done by a servant solely for his own interest and purposes, although occasioned by his employment, may fall outside the course and scope of his employment, and in deciding whether an act by the servant does so fall, some reverence is to be made to the servant's intention (*cf Estate van Der Bijl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nonetheless a sufficient close link between the servant's acts for his own interest and purpose and the business of his master, the master may yet be liable. This is an objectives test.'"

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[4] [2018] ZACC 18.
[5] ZASCA 26 (28 March 2019 Case no 273/2018 [2019].
[6] 1986 (1) SA 117 (A) at 134C.

[7] The Constitutional Court in the case of *K v Minster of Safety & Security*[7] adopted the test laid down in the *Rabie* case. The Constitutional Court through O'Regan J correctly held when it stated the test as follows:

"[32] The approach makes it clear that there are two questions to be asked. The test is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is purely factual question. Even if it is answered in the affirmative, however; the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficient close link between the employee's act for his own interest and the purpose and business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The question of law raises relate to what is 'sufficiently' to give rise to vicarious liability. It is in answering this question that a Court should consider the need to give effect to the spirit, purport and objectives of the Bill of Right".

[8] In the matter of *ABSA Bank v Bond Equipment (Pretoria) (Pty) Ltd*[8] it was held that:

"[5] The standard test for vicarious liability of a master for the delict of a servant is whether the delict was committed by the employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the relevant time the employee was about the affairs, or business, or doing the work of, the employer (see for example, *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 132 G; *Minister of Law and Order v Ngcobo* 1992(4) SA 822(A) at 827B). It should not be overlooked, however, that the affairs of the employer must relate to what the employee was generally employed or specifically instructed to do. Provided that the employee was engaged in activity reasonably necessary to achieve either objective, the employer will be liable even where the employee acts contrary to express instructions (see for example, *Estate van der Byl v Swanepoel* 1927 AD 141 at 145-146, 151-152). It is also clear that it is not every act committed by an employee during the time of his employment which is for his own benefit or the achievement of his own goals which falls outside the course and scope of his employment. (*Viljoen v Smith* 1997(1) SA 309 (A) at 315 F-G.) A master is not responsible for the private and personal acts of his servant, unconnected with the latter's employment, even if done during the time of his employment and with the permission of the employer. The act causing damage must have been done by the servant in his capacity *qua* servant and not as an independent individual. (See for example *Feldman (Pty) Ltd v Mall*, 1945 AD 733 at 742 and *H.K. Manufacturing Co (Pty) Ltd v Sadowitz* 1965 (3) SA 328 (C) at 336 A.)

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[7] 2005 (6) SA 419 CC.

[8] [2001] 1 ALL SA (1) (A) 1

The test in this latter regard was formulated by Jansen JA in *Minister of Police v Rabie* (supra) at 134 D-E as follows:-

> "It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (*cf Estate van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's act for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. And it may be useful to add that according to the *Salmond* test (cited by Greenberg JA in *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 774).
>
> 'a master ..... is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes - although improper modes - of doing them .....' "

Tindall JA put the matter as follows in the *locus classicus* on the vicarious liability of an employer for the deeds of an employee, in *Feldman (Pty) Ltd v Mall*, supra at 756 - 757:

> "In my view the test to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time that it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case the master is not liable. It seems to me not practicable to formulate the test in more precise terms; I can see no escape from the conclusion that ultimately the question resolves itself into one of degree and in each particular case the matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed."(See also the remarks of Watermeyer CJ at 742 and Davis AJA at 784).

The effect of the "two tier test", as postulated by Jansen JA, is that an employer will only escape liability if his employee had the subjective intention of promoting solely his own interests and that the employee, objectively speaking, completely disassociated himself from the affairs of his employer when committing the act.

The nature and extent of the deviation is a critical factor. Once the deviation is such that it cannot reasonably be held that the employee is still exercising the functions to which he was appointed, or still carrying out some instruction of his employer, the latter will cease to be liable. Whether that stage has been reached is essentially a question of fact (see for example *Feldman (Pty) Ltd v Mall* (supra) at 756-7; *Union Government v Hawkins* 1944 AD 556 at 563; *Viljoen v Smith*, (supra) at 316 E - 317A). The answer in each case will depend upon a close examination of the facts. The same is true of the enquiry as to whether the deviation has ceased and the employee has resumed the business of his employer."

[9] It is common cause that Seloane unlawfully shot the plaintiff, with a singular purpose and intent to kill her; *vide Minister of Police v Rabie*[9]. It is also common cause that he was on

[9] (supra) at para 134C-D.

his own frolic, when he committed his dastardly act. It then requires of the court to determine on objective basis, whether the defendant was vicariously liable under the circumstances; *vide K v Minister of Safety & Security (supra)* at para [32]. As stated in *Minister of Safety and Security v Booysen* [2016] ZASCA 201: "The question remains in this case whether there is a sufficient link between the conduct of Seloana and his employment to impose vicarious liability on the Defendant. "That question can only be answered by considering the normative factors referred to earlier, and countervailing factors, this conducting a balancing act." *vide Booysen* matter *(supra)* at para 19.

[10] The normative factors to be considered, as stated in *F v Minister of Safety and Security*[10]: "The normative components that point to liability must, as K indicated, be expressly stated. They are the state's constitutional obligations to protect the public; trust that the public is entitled to place in the policeman, the significance, if any, of the policeman having been off duty and on standby duty, the role of..."(*in casu* Sebiloane of the simultaneous shooting of the plaintiff and the other gentleman he suspected to be romantically involved with the plaintiff) "...and omission to protect the victim, and the existence or otherwise of an intimate link between the policeman's conduct and his employment. All these factors complement one another in determining the state's vicarious liability in this matter."

[11] In this regard it is instructive to look at the evidence of, *inter alia*:

11.1 **the plaintiff who testified that**: When Sebiloane shot her with six bullets she fell and he looked at her and asked her whether she was still alive. She asked him why he was doing this to her. **He shot her again with one bullet.** He said that "they" wanted to separate him with her. He lifted her and put her at the back of his car and took her to the hospital. He used his work firearm when he shot her. She did not believe that he would shoot her, because he is a policeman; people who protect community. He fell in love with him as a police officer, because police are respected in the community and she would have security and also the dignity. By shooting her he was not protecting her;

11.2 **Mr. Kongotela Raymond** Mabasa testified on behalf of the plaintiff, that he is employed with the Independent Directorate which unit investigates alleged crimes committed by members of the police force. He was the investigating officer in this matter. He discovered through his investigation that Sebiloane fired several gun shots of which four were directed to the plaintiff. Sebiloane was in the employ of the SAPS and he used the police firearm. During the investigation it was discovered that he was not competent to possess and be issued with a firearm. They looked for his competence certificate to no avail. During his investigation he

[10] 2012 (1) SA 536 CC at para 52.

called for a certificate and found that a competent certificate was not issued but a temporary one, which was issued to Sebiloane by Captain Khoele who was not competent to do so in terms of Regulation 79. A competency certificate must be obtained annually and the Sebiloane was in conflict with this provision and violated this law. Section 48 indicates that a member is not entitled to be issued with a firearm, when he is off duty.

11.3 Captain Khoele the only witness for the defendant, testified that, *inter alia*, he was in the same unit with Sebilaone as they worked together. He conceded that Sebiloane was, prior to the shooting incident *in casu*, internally disciplined for misconduct that he shot a person with his firearm with 25 rounds. He further testified that Sebiloane did not make an application to possess the firearm while he was off duty.

[12] Section 77 of the Regulation provides that the permit issued under section 98 of the Act must provide, *inter alia*, "(1)(f) information whether the employee has been authorised to

(i) have the firearm in his or her possession after working hours;

(ii) carry the firearm on his or her person outside his or her workplace in compliance with the with the requirements of section 84 of the Act;".

[13] The evidence of both Mabasa and Khoele concerning that Sebiloane was not authorised to carry his firearm when he was off duty, was not disputed. If he was, the *onus* of proving such authorization rested on Sebiloane, but failed to discharge same. In the circumstances I find that he was not duly authorised to carry his firearm while off duty.

[14] Sebiloane, as a member of the defendant, has a constitutional duty to protect all and sundry at all times. That duty flows from the constitutional imperatives of the defendant to protect the general public, through the police force. That duty comes with obligations, (a) to provide members of the police force with firearms, (b) to ensure compliance with the prescripts of the law on the part of its members; (c) to withdraw the issued firearm to its members if circumstances dictate, *inter alia*.

[15] *In casu,* there was an omission on the part of the defendant, in not ensuring that Sebiloane surrendered his firearm when he went off duty on that unfortunate day of the shooting.

[16] There is also evidence that Sebiloane was internally disciplined for shooting someone with 25 rounds. Section 79 (2) (b)(ii) of the Regulation 2004 provides that the official institution which provides firearm of the employee undergoes psychological debriefing within 48 hours after experiencing any violent incident, discharging their firearm or witnessing a shooting. The defendant did not place any evidence to show that Sebiloane underwent

such psychological debriefing after that 25 round shooting incident, which occurred prior to the shooting of the plaintiff.

[17] In my view, the fact that the defendant was aware of the character and or disposition of Sebilaone, demanded that strict compliance on the part of Sebiloane, in the handling of firearms, such as handling his firearm when off duty. The defendant bore the *onus* of proving that Sebiloane has undergone all necessary competency requirements and is also compliant with the necessary prescripts. In my view there was omission on the part of the defendant on its constitutional imperatives, to ensure that when Sebiloane is allowed to possess a firearm, the public is safe.

[18] I the matter of McIntosh v Premier, KwaZulu-Natal and Another[11] where the Supreme Court of Appeal held , *inter alia*, that:

> "[12]....As is apparent from the much-quoted dictum of Holmes JA in Kruger v Coetzee1966 (2) SA 428 (A) at 430E – F, the issue of negligence itself involves a twofold inquiry. The first is: was the harm reasonably foreseeable? The second is: would the *diligens* paterfamilias take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply whether the defendant had a duty to take one or other step, such as... perform some or other act, positive act, and if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty." This requires a value judgment, as I do, that a reasonable man, would have foreseen that Sebiloane, having recently fired 25 rounds at a person, without having undergone a psychological debridement, presented a danger to society, must be reined in to hand his firearm when off duty, failing which he might cause harm to innocent persons. The defendant omitted in ensuring that Sebiloane hands in his firearm when off duty, as such was negligent and accordingly liable to the plaintiff as the result of the relevant shooting incident *in casu; vide McIntosh v Premier, KwaZulu-Natal and Another.*[12]

[19] It is trite that costs follow the event. *In casu*, both parties engaged the services of two counsel, justifiable so, regard being had to the fine point of law and the quantum involved.

[20] In the result the following order is hereby issued:

1. That the defendant is liable to compensate the plaintiff such proven damages;
2. That the defendant pays the plaintiff's taxed or agreed costs, such costs to include the costs of two counsel.

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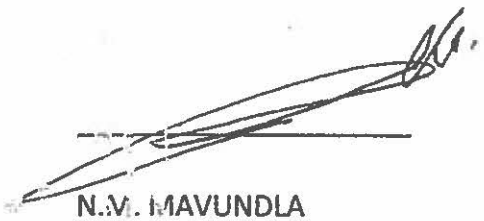
[11] 2008 (6) SA 1 (SCA) at page 8H

[12] supra at par [14].



N.V. MAVUNDLA

JUDGE OF THE COURT

DATE OF JUDGEMENT: 15 / 01 / 2020

PALINTIFF'S ADV : ADV. MPHE SC

WITH : ADV GDM DUBE

INSTRUCTED BY : MAOBA ATTORNEYS INC .

RESPONDETS' ADV : ADV. P.J.J. DE JAGGER S. C

INSTRUCTED BY : STATE ATTORNEYS