

SOUTH AFRICA / JUDGMENT

**Basdew NO v Minister Safety and Security
(14271/2007) [2011] ZAKZDHC 50; 2012 (2)
SACR 205 (KZD) (4 November 2011)
[2011] ZAKZDHC 50**

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Steyn

CASE / FILE NUMBER
14271/2007

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IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No: 14271/2007

In the matter between

Michelle Julian Basdew N.O.Plaintiff

and

Minister of Safety and SecurityDefendant

JUDGMENT

4 November 2011

Steyn J

- [1] This is an action for the loss of support that arose from an incident where a mother of three minor children was shot and killed by her ex-husband. The case focussed once more on domestic violence and the impact it has on a family. The deceased was killed at a time when she sought protection from the South African Police.
- [2] The plaintiff is Michelle Julian Basdew N.O., an adult female advocate, who acts as, and sues in her capacity as curator-ad-litem to the minor children M V N, a boy born on 24 June 1989, Z N, a girl born on 24 February 1991, and M P N, a girl born on 2 August

1993. The defendant is the Minister of Safety and Security and the employer of two policemen who in the course and scope of their employment as employees of the defendant responded to a call to assist a member of the public, Ntombifikile Ngidi (hereinafter referred to as the deceased).

[3] At the time when the matter was heard the court was called upon to decide on the issue of liability only, since the parties agreed that the merits be separated from the quantum of the claim.

[4] On 8 August 2011, the plaintiff called 3 witnesses to testify in support of the claim. After the testimony of the plaintiff's witnesses the plaintiff closed its case and the defendant thereafter elected to close its case without adducing any evidence.

In pursuit of the claim the plaintiff relied on a number of grounds of negligence which are inter alia encapsulated in the following particulars of claim, averring that the police officers were aware:

"4 (a) [i] of the abuse being perpetrated against

the deceased by her husband on the said date;

[ii] of the threats made by Vusi against the deceased's life;

[iii] that Vusi was in possession of a firearm, alternatively should have reasonably suspected that Vusi was in possession of a firearm;

[iv] that Vusi had threatened to kill the deceased by shooting her with his firearm;

[v] that they were summoned by the deceased to protect her from the abuse perpetrated against her by Vusi on the said date and the threats against her life;

[vi] that according to the deceased she previously obtained a protection order against Vusi.

(b) On the said date, the said two police officers

failed and or neglected to protect the deceased from being shot with a firearm by Vusi in, inter alia, the following manner:

[i] they failed and /or neglected to search and dispose Vusi of his firearm;

[ii] they failed and /or neglected to keep Vusi constrained or within sight, alternatively away from the deceased;

[iii] they permitted Vusi, whilst armed with his firearm, to enter the deceased's bedroom, whilst she was there on her own and without protection

and in addition

7 (a) The said police officers failed and/or neglected

to exercise reasonable care to prevent the deceased from being shot and killed when there was a legal duty on them to do so;

- (b) The said police officers failed and/or neglected to take reasonable or adequate steps to prevent the assault and killing of the deceased when by exercising reasonable care they could have done so;
- (c) The said police officers, in the circumstances, acted wrongfully, negligently and unlawfully.”

The defendant in its plea denied that the officers were negligent.

- [5] Before the trial commenced a bundle was handed in containing inter alia the police docket that related to the deceased’s murder. The parties agreed at the pre-trial conference that the docket could be handed in as proof of what it was.
- [6] Plaintiff indicated that evidence would be adduced that on the night of 11 February 2004 the deceased’s screams were heard by her son, M N. On further investigation she could not be found in the yard or on the property. Much later the deceased, however, returned to the house in the company of two policemen. The policemen were informed of the fact that the ex-husband owns a firearm before arriving at the couple’s home. The policemen, despite being asked to protect the deceased, neither searched the ex-husband nor did they keep him under observation in the house.
- [7] The three witnesses that testified on behalf of the plaintiff’s case were Ms D Ngidi, Mr M N and Z N.

Ms Dorris Ngidi’s evidence in short was that she is the sister in law of the deceased. The deceased arrived at her home at midnight, scantily dressed in a night dress and informed her that there was a disagreement between her and her ex-husband, Vusi, and that she feared that he might shoot her. The deceased told her that she informed the police, and whilst at her house, the deceased contacted the police and gave them directions to the house. She was present when the policemen arrived and when the deceased told them that she had run away from home. The deceased asked the police to accompany her to her house to collect her belongings and her car. She informed the police that there were problems between her and her ex-husband. She also informed them that her ex-husband has a firearm. The police also asked her whether her brother, Vusi, had a firearm and she confirmed that he did.

She informed the police, as they were leaving, that she hopes that the deceased would be safe with them. In cross-examination she conceded that she was not certain whether the deceased told the police that she was threatened by her ex-husband. She was, however, adamant that the deceased informed the police that she was scared of her ex-husband because he has a firearm.

- [8] The second witness, M N, is the son of the deceased and the brother of two younger sisters. He heard his mother crying and rushing out of the home. He then went to look for her. He asked his father, Vusi, who was laying down, what had happened and his father just said his mother was crazy. He decided to wake his sisters and go and look for his mother. The

children asked their father to go and search for their mother. Their father left in the white Jetta that belonged to their mother but returned after a while and said that he could not find her. His father told them to go back to sleep. Later that night his father woke them up and said they must come and see that their mother is at the house to get him arrested. The whole family then went to the front gate and his father opened the gate for his mother and the police.

One of the policemen then asked his father whether he has a firearm and his father denied it. The police then informed his father that his wife is there to fetch her belongings and her car. His father indicated that it is in order. They all entered the house and the policemen went and sat in the lounge, whilst his mother went to the bedroom followed by his two sisters. He proceeded to his sister's bedroom and left his father in the company of the policemen.

After a few minutes gunshots went off and he ran out of the house. Before he exited the house he noticed that his father was sitting on the bed in the main bedroom. He found his sisters and the policemen outside the house. When he noticed the policemen it appeared that they were coming towards the house. The policemen neither searched his father when he said he did not have a gun on him nor did they put any other questions to him regarding the firearm.

[9] Z N, the sister of M N, also testified and confirmed that her mother screamed before exiting the house. She explained how they searched for her mother. Later that night she was woken by the arrival of the police at their house. Her mother was in the company of the police. Her mother was crying and the policemen told her father that his wife is there to collect her goods. She confirmed that one of the officers asked her father whether he was in possession of a firearm, but he denied it. The police told her mother to go and fetch her belongings. At that moment her father was standing with the police inside the house.

She followed her mother to the bedroom where her mother was pulling a suitcase from a cupboard. Her father then came into the room, pulled out his firearm from under his belt and fired shots at her mother without saying a word. She started hitting her father with a cell phone charger which she had in her possession. She then ran out of the house and noticed that the police officers were no longer inside the house but at the gate. The officers asked them what had happened. The police ordered them to stand behind the van. They called upon her father to come out and hand over his firearm but he failed to respond. He only reacted when she called out his name.

[10] This concluded all the evidence on behalf of the plaintiff. Defendant closed its case without tendering any evidence. Adv Ngcobo, on behalf of the plaintiff, asked that the defendant be held liable since there was a legal duty on the defendant to act positively to prevent the harm from occurring and the defendant failed to comply with that duty. Adv Khuzwayo, acting on behalf of the defendant, argued that in the given the circumstances there was no basis laid before the court that showed that the officers were negligent.

- [11] No criticism can be levelled against the witnesses of the plaintiff; they were consistent in their testimony. I am satisfied that all three of the witnesses were not only reliable but also trustworthy. The plaintiff succeeded in establishing a prima facie case. The defendant had to answer to the case but elected not to call the officers. The plaintiff's evidence therefore stands unchallenged. The question that remains is whether the evidence of the plaintiff proves that the defendant is liable.

Legal Framework

- [12] Since 1975 it has been recognised in our law that an omission falls within the concept of voluntary conduct.¹ What is important in this matter is the wrongfulness of an omission under circumstances where there was a positive duty on the officers to act in accordance with their duties. An enquiry into the reasonableness of the conduct of the police would therefore be necessary.

It is also necessary to determine whether there is a factual causation between the police's omission and the deceased's death.² The most common test to use in determining factual causation is the sine qua non test.³ In determining the wrongfulness it is also necessary to consider whether the omission of the officers to not seize the firearm of Mr Ngidi would have lead to the foreseeable harm, i.e. the death of Mrs Ngidi as caused by him.

In *Gouda Boerdery BK v Transnet Ltd*⁴ Scott JA stated the test as follows:

“ . . . Where the element of wrongfulness gains importance is in relation to liability for omissions and pure economic loss. The inquiry as to wrongfulness will then involve a determination of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without negligence: in other words to avoid negligently causing the plaintiff harm. This will be a matter for judicial judgment involving criteria of reasonableness, policy and, where appropriate, constitutional norms. If a legal duty is found to have existed, the next inquiry will be whether the defendant was negligent. . . . The courts have in the past sometimes determined the issue of foreseeability as part of the inquiry into wrongfulness and, after finding that there was a legal duty to act reasonably, proceeded to determine the second leg of the negligence inquiry, the first (being foreseeability) having already been decided. If this approach is adopted, it is important not to overlook the distinction between negligence and wrongfulness.”

(Original footnotes omitted, my emphasis)

- [13] Our Supreme Court of Appeal has dealt in a number of cases with the legal duty of police officers in particular not to cause harm or to prevent harm to others.⁵ An omission will cause liability if the omission is culpable as determined by the test as set out in *Kruger v Coetzee*,⁶ that is whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avoid it.⁷
- [14] The nature of the minor children's action for loss of support has been endorsed by the appellate division.

In Suid-Afrikaanse Nasionale Trust en Assuransiemaatskappy Bpk v Fondo8 Botha AJA (as he then was) referred with approval to the above statement of Innes CJ saying that –

“... ‘n kenmerk van die regsmiddel [i.e. the dependant’s action for loss of support], wat dit terloops ook van ‘n suiwer aksie

onder die lex Aquilia onderskei, die anomalie is dat dit gebaseer is op ‘n versuim om sorg te dra, nie teenoor die aanleggers nie, maar teenoor die oorledene, terwyl die vorderingsreg nie aan die oorledene of sy boedel ontleen word nie, maar regstreeks aan sy afhanklikes op grond van hul eie vermoënskade wat vloei uit hul verlies van onderhoud as gevolg van die dood van die oorledene waarvoor die wandader aanspreeklik is, verleen word.”⁹

[15] Reverting to the facts of this case it is evident that both officers were clearly engaged in the business of their employer when the delict was committed. First, the policemen were under a general duty to prevent and protect members of the public against crime. Second, they offered assistance to Mrs Ngidi which she had accepted and therefore the police owed a special duty to her.¹⁰

There were clear warning signs to the police that the ex-husband of the deceased posed a serious threat to her physical safety. She was fearful and informed them that her ex-husband was in possession of a firearm. The fear was so real that she required their police protection to go to her own house to fetch her belongings. The evidence of Mrs Doris Ngidi confirmed the statement of the deceased that Vusi Ngidi had a firearm. Under these circumstances it is reasonable to expect that the police officers would have done more than just putting one question to the ex-husband, i.e. whether he was in possession of a firearm. Reasonable policemen would have guarded the husband and not let him out of sight, given the earlier information relayed to them by the deceased and Mrs Doris Ngidi. Given the aforesaid information it is reasonable to expect of an officer to search the person whom allegedly has a firearm in his possession. In the premises I am of the view that it was reasonably foreseeable to the officers that harm may ensue to the deceased if they do not seize the firearm or prevent the ex-husband from using it. The failure to search him and to guard him and to prevent him from getting to the deceased, make the defendant liable on a balance of probabilities.

[16] Order

16.1 The defendant is found to be liable for all such damages as may be proven by the plaintiff or as agreed between plaintiff and defendant.

16.2 The defendant is ordered to pay the plaintiff’s costs of this action.

Date of Hearing: 10 August 2011

Date of Judgment: 4 November 2011

Counsel for the Plaintiff: Adv M Ngcobo

Instructed by: Dickinson & Theunissen Inc.

Counsel for the Defendant: Adv T Khuzwayo

Instructed by: State Attorneys Office

(KwaZulu-Natal)

1See *Minister van Polisie v Ewels* 1975 (3) 590 (A) at 597A and *Geldenhuis v Minister of Safety and Security* [2002] 3 All SA 82 (C).

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2See *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) for a distinction between factual and legal causation.

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3See *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 35D-F.

4 2005

(5) SA 490 (SCA) para 12.

5See *Minister of Safety and Security and Another v Carmichele* 2004

(3) SA 305 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002

(6) SA 431 (SCA). *Minister of Safety and Security v Hamilton* 2004

(2) SA 216 (SCA); *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003

(1) SA 389 (SCA); *Minister van Veiligheid en Sekuriteit en 'n ander v Geldenhuis*

[2003] 4 All SA 330 (SCA); *Minister of Safety and Security v Madyibi* 2010

(2) SA 356 (SCA); and *Brooks v Minister of Safety and Security* 2009

(2) SA 94 (SCA).

6 1966

(2) SA 428 (A).

7Van Duivenboden *supra* at 441 F-H.

8 1960

(2) SA 467 (A) at 471H—472A.

9Also see *Brooks v The Minister of Safety and Security* [2007] 4 All SA 1389 (C) at para 17; *Legal Insurance Co Ltd v Botes* 1963

(1) SA 608 (A).

10See *The Minister of Safety and Security v F* [2011] ZASCA 3 (22 February 2011) para 17 fn 37.

10See *The Minister of Safety and Security v F* [2011] ZASCA 3 (22 February 2011) para 17 fn 37.

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