

SOUTH AFRICA / JUDGMENT

Booyesen v Minister of Safety and Security (2915/2013) [2015] ZAECHGC 56 (15 May 2015)

[2015] ZAECHGC 56

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Plasket

CASE / FILE NUMBER

2915/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: 2915/2013

DATE

HEARD: 11/05/2015

DATE

DELIVERED: 15/05/15

NOT

REPORTABLE

In

the matter between:

ELSA

BOOYSEN.....PLAINTI

FF

and

THE

MINISTER OF SAFETY AND

SECURITY.....DEFENDANT

JUDGMENT**PLASKET J**

[1] The plaintiff instituted a damages claim against the defendant arising from a tragic event that occurred at her home at 20 Kudu

Street, Nelsig, Pearston on the evening of 22 March 2013 when her boyfriend, one Johannes Mongo, shot her in the face before turning

his firearm on himself and taking his own life.

[2] At the commencement of the trial I was asked to separate the merits from quantum. I duly did so. The ambit of the trial on the merits is narrow. The defendant concedes all elements of delictual liability in relation to the shooting of the plaintiff except for one issue: he disputes that he is vicariously liable for the damage suffered by the plaintiff as a result of Mongo's conduct.

[3] A comprehensive set of facts was agreed to by the parties and recorded in a rule 37 minute. In addition, the plaintiff testified.

[4] Mongo was, at all material times, a reservist with the rank of constable in the employ of the South African Police Service (SAPS).[1] He was on duty working night shift on 22 March 2013, dressed in a SAPS uniform and armed with a 9mm Parabellum semi-automatic pistol issued to him by the shift commander at the commencement of his shift. He had been assigned crime prevention duties and was required to attend to complaints made by members of the public.

[5] On the day of the incident, Mongo was dropped off by a marked police vehicle at the home of the plaintiff so that he could have dinner there. The plaintiff testified that this was his routine when he was on duty on Friday and Saturday nights. When he had eaten, the police vehicle would return and collect him, and he would continue with his duties.

[6] The plaintiff testified that when Mongo arrived, he offered to buy everyone cold drinks, which he did. After he ate his dinner he sat outside with the plaintiff. Without warning, he drew his pistol, shot the plaintiff in the face and turned the pistol on himself.

[7] The plaintiff conceded – and correctly so – that as she had not foreseen this happening, the management of the SAPS could not have either. There appears to have been no signs at all that Mongo would do such a thing. The plaintiff also testified that she and Mongo had not argued or had problems in their relationship. His last words to her were to the effect that if he could not have her, nobody else would. From this I assume that Mongo had taken a decision to commit suicide.

[8] It is within the context of the facts that I have set out that I must decide if the defendant is vicariously liable for Mongo's

wrongful and unlawful conduct.

[9] In the normal course, a person is not liable in delict to another unless he or she has caused harm to that other person by a wrongful and unlawful act or omission.[2] The imposition of vicarious liability is an exception to this norm: an employer who has committed no wrong is held liable for the

consequences of his or her employee's wrongful and unlawful conduct.[3]

[10] While more than one policy consideration underpins vicarious liability, one consideration that appears to be of particular

importance was identified by Watermeyer CJ in *Feldman (Pty) Ltd v Mall*[4] when he held:

'I have gone into this question more fully than seems necessary, in the hope that the reasons which have been advanced for the imposition of vicarious liability upon a master may give some indication of the limits of a master's legal responsibility, and the reasons are to some extent helpful. It appears from them that a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm.'

[11] Whether an employer will be vicariously liable for a delict committed by an employee is usually said to depend on whether the employee was acting within the course and scope of his or her employment. This formulation is not always helpful because, as the cases recognise, one is usually dealing with questions of degree in cases in which there is a deviation from the duties entrusted to the employee.[5]

[12] With this in mind O'Regan J, in *K v Minister of Safety and Security*,[6] set out the approach to be followed in these so-called deviation cases (like the present case):

'The approach makes it clear that there are two questions to be asked. The first 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 a 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 sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is "sufficiently close" 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 objects of the Bill of Rights.'

[13] In *F v Minister of Safety and Security & others*,^[7] a case in which an off-duty policeman who was on stand-by and who was not dressed in uniform, raped a woman, Mogoeng J set out what he termed the ‘normative components that point to [vicarious] liability’ as follows:^[8]

‘They are: the State's constitutional obligations to protect the public; the trust that the public is entitled to place in the police; the significance, if any, of the policeman having been off duty and on standby duty; the role of the simultaneous act of the policeman's

commission of rape 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 elements complement one another in determining the State's vicarious liability in this matter.’

[14] In this case, some of these aspects are present, while others are not. The obligation of the State, particularly of the SAPS, to protect the public and the fact that Mongo's act was both the commission of a crime and a delict and, at the same time, an omission to protect the plaintiff apply to this matter. In addition, however, unlike the situation in *F*, Mongo was on duty and in uniform.

[15] In this case, the issue of trust does not arise (except in the most general of terms) in the same way that it did in *K* and *F* in the sense that the fact that the victims placed trust in the rapists because they were policemen facilitated, to an extent, the rapes. I agree with Rogers J, in *Pehlani v Minister of Police*,^[9] that this element is not a prerequisite for vicarious liability but merely one factor that may or may not be present.^[10] That case displays a number of similarities with this case. A police reservist had volunteered for duty, had found her former boyfriend,

whom she had previously assaulted and threatened, and had opened fire on him with her police-issue firearm, wounding him on the hand and in the stomach. She was also dressed in a SAPS uniform at the time, but she had abandoned the beat allocated to her. On these facts, Rogers J found the defendant to be vicariously liable.

[16] I also agree with Rogers J that far more significant than the trust issue, in the circumstances of *Pehlani* and this case, is the fact that both the policewoman (*Petshwa*) in the former case and Mongo in this case used a police-issue firearm to commit the delict in question. He stated:^[11]

‘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.'

[17] I also take into account as strong indications in favour of the imposition of vicarious liability that Mongo was on duty, was dressed in uniform and had been dropped off for his dinner by a police vehicle and would, but for the unfortunate events of that evening, have been picked up by the vehicle so that he could resume his assigned duties.

[18] In my view, therefore, the plaintiff has succeeded in proving that the defendant is vicariously liable for the delict committed by Mongo against the plaintiff. As a result, she succeeds as far as the merits are concerned.

[19] I make the following order.

- (a) The defendant is liable for whatever damages the plaintiff may in due course prove arising from her being shot by the late Johannes Mongo on 22 March 2013 at 20 Kudu Street, Nelsig, Pearston.
- (b) The defendant is directed to pay the plaintiff's costs.

C Plasket

Judge of the High Court

APPEARANCES

For the plaintiff: D Niekerk instructed by NN Dullabh & Co

For the defendant: G Bloem SC and J Bester instructed by Whitesides

[1] Section 48(6) of the South African Police Service Act 68 of 1995 provides: 'A member of the Reserve shall be deemed to be in the employ of the Service while on duty, notwithstanding the fact that such member may not be remunerated by the Service.'

[2] Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority 2006

(1) SA 461 (SCA) para 12.

[3] K v Minister of Safety and Security

[2005] ZACC 8; 2005

(6) SA 419 (CC) para 21; F v Minister of Safety and Security & others 2012 (1) SA 536 (CC) para 40.

[4] Feltman (Pty) Ltd v Mall 1945 AD 733 at 741. See too F v Minister of Safety and Security & others (note 3) para 45.

- [5] K v Minister of Safety and Security (note
- 3) para 25; Minister of Police v Rabie 1986 (1) SA 117 (A) at 134C-E; Feltman (Pty) Ltd v Mall (note 4) at 756-757.
- [6] Note 3 para 32.
- [7] Note 3.
- [8] Para 52.
- [9] Pehlani v Minister of Police WCC 25 September 2014 (case no. 9105/2011) unreported, para 31.
- [10] Para 31.
- [11] Para 32.
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