

SOUTH AFRICA / JUDGMENT

Calitz and Others v Minister of Police (62934/2014) [2021] ZAGPPHC 733 (29 October 2021) [2021] ZAGPPHC 733

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

62934/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

CASE

NO: 62934/2014

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

NOT

REVISED

In

the matter between:

JOLANDIE

CALITZ AND TWO OTHERS

N.O. PLAINTIFF

and

MINISTER

OF

POLICE DEFENDANT

JUDGMENT

Van der Schyff J

Introduction

- [1] On 13 June 2014, Mr. Calitz, the husband of the first plaintiff and father of the second and third plaintiffs, was arrested by security officers at Menlyn Mall Shopping Centre. The security officers were employed by a private security company. After his arrest, the security officers conducted a body search, and several suspicious items, including various remote control vehicle locking devices and suspected stolen goods, were confiscated from him. Members of the South African Police Services stationed at Brooklyn Police Station (the members, members of the SAPS, or SAPS members) were informed of the arrest and came to the Mall. Mr. Calitz and his co-accused were handed over to the members. The SAPS members were informed that Mr. Calitz was searched, and the items confiscated from him were handed over to them. Mr. Calitz, who co-operated with the security officers and the members, was not again subjected to a body search by the SAPS members. He was not constrained and was loaded into the back of a police vehicle. He was transported to Brooklyn Police Station. Unbeknown to the security officers or the members, Mr. Calitz ('the deceased') had a firearm. On arrival at the Brooklyn Police Station, he committed suicide whilst still in the SAPS vehicle by shooting himself.
- [2] The plaintiffs instituted a delictual claim for damages against the defendant based on the alleged breach of a statutory duty created in terms of SAPS Standing Order (G 341 read with the Regulations promulgated under the South African Police Services Act, 68 of 1995 ('the Act') ('the Standing Order')). The plaintiffs relied specifically on clause 8(4) of the Standing Order, which obligates members of the SAPS to search every arrested person 'upon arrest' to determine whether the person carried concealed weapons with which the person may injure himself or herself, or others.
- [3] The matter came before the court only on the issue of liability as merits and quantum were automatically separated in terms of the Practice Directive of the Division.

The pleadings

- [4] In their particulars of claim, the plaintiffs allege that the deceased was arrested and detained by members of the SAPS on 13 June 2014 between 16:00 and 16:30. The deceased was loaded into the back of a police 'van.' En route to the police station, the police vehicle pulled off the road and stopped. It was found that the deceased shot himself. The members did not render the deceased any medical assistance and did not seek assistance from a medical response team. They did not contact the SAPS duty officer or any other officer to visit the scene. They proceeded to travel to Brooklyn Police Station and not to the nearest hospital. The deceased was pronounced dead in the back of the police vehicle by a paramedic official at Brooklyn Police Station. It was later found that the deceased shot himself

with a firearm belonging to one of his friends, Mr. Daniels. The firearm was an average-sized 9mm parabellum Luger. Mr. Daniels and the deceased resided in the same home. The SAPS falsely reported on their CAS system that the deceased had shot himself on arrival at the Brooklyn Police Station.

- [5] The Independent Police Investigation Directorate conducted an investigation, found that the SAPS members were negligent, and advised disciplinary action against the police officials involved. The members never body searched the deceased when they arrested and detained him. The members were acting within the course and scope of their employment. The members had a statutory duty in terms of the SAPS Standing Order to search the deceased before the deceased was transported to determine whether he had any weapons on him. In omitting to search him, the members breached this statutory duty. As a result of the negligent and wrongful conduct of the members of the SAPS, the deceased committed suicide. Had it not been for the members' failure to (i) search the deceased when arresting and detaining him; (ii) rendering him immediate medical assistance after he shot himself; (iii) immediately contacting an ambulance to attend to him on the scene, (iv) rushing him to the hospital, the deceased would not have died alternatively, could still have been alive. During his lifetime, the deceased had a legal duty to contribute to the plaintiff and their minor children's support and, had he not died, would have been legally obliged to continue to support the plaintiffs. The deceased supported the plaintiffs prior to his death and earned an income as a financial advisor. As a result of the deceased's death, the plaintiffs suffered (i) extreme distress and permanent psychological shock; (ii) loss of income; and loss of consortium. The plaintiffs suffered damages in the amount of R7 235 400.00 for (i) future psychological expenses; (ii) general damages; (iii) future loss of income and income capacity of the deceased – 'rehabilitative maintenance'; (iv) maintenance for both children, and (v) funeral expenses.
- [6] In its plea, the defendant denies that the deceased was the husband of the plaintiff. The defendant admits that the deceased was detained by members of the SAPS but denies that the SAPS members arrested the deceased. The defendant denies that the deceased shot himself en route to the police station and pleads that he shot himself after the police vehicle arrived at the Brooklyn Police Station. The defendant admits that the deceased shot himself with a firearm of which he was not the owner and pleads that the deceased was unlawfully in possession of the said firearm and ammunition. The defendant pleads that the deceased was thoroughly searched after his arrest at the Menlyn Mall Shopping Centre and denies that any members failed to perform their duties as alleged or at all. The defendant

denies (i) that any conduct of the members caused or contributed to the deceased's death as he intentionally shot himself; (ii) that any member neglected their duties as alleged or at all; (iii) that the members' conduct was the sole cause of the deceased's death; (iv) that members failed to perform their duties; (v) that the members had a duty of care to the deceased in safeguarding him against inflicting any injury upon himself. In the alternative, it is pleaded that if it is found that the members of the SAPS failed to perform their duties or acted negligently, then it is pleaded

that the negligence or failure of the members to perform their duties did not contribute to the death of the deceased and that the sole cause of the death of the deceased was the deceased's intentional conduct to shoot himself. The defendant also denied that (i) the deceased had a legal duty to contribute to the plaintiff's support or that he was the natural father of the second and third plaintiffs or had a duty to support them; (ii) that the deceased earned an income or was employed as a financial advisor.

The evidence

(i) Common cause facts

[7] At the onset of the trial, the common cause facts agreed to and admitted by the parties were that (i) the deceased was arrested by security officers in the service of a private security company at Menlyn Mall Shopping Centre on 13 June 2014; (ii) after his arrest he was detained by the security officers and collected by members of the SAPS; (iii) he was transported to Brooklyn Police Station in the back of a police vehicle while being alone in the back of the vehicle; (iv) he was not searched by members of the SAPS before being transported to Brooklyn Police Station; (v) he was in possession of a firearm (which he did not own) whilst being transported to the police station; (vi) he committed suicide by shooting himself while in the SAPS vehicle; (vii) the first plaintiff was married to the deceased on the date of his passing and the second and third plaintiffs were the children of the first plaintiff and the deceased; (viii) the Standing Order was in force on the date of the incident.

(ii) Evidence led on behalf of the plaintiffs

[8] Two witnesses testified in support of the plaintiff's case. The first plaintiff, Ms. Calitz, testified that she was married to the deceased and that two minor children were born from their marriage. The deceased supported her and the children financially. She earned an income of approximately R6000.00 per month. The deceased kept her bank card and paid all the household expenses as he deemed fit from their combined income. Her evidence did not shed any light on the circumstances of and before the suicide.

[9] During cross-examination, it became evident that Ms. Calitz and her children were living with her parents at the time of the incident. She attributed the separation to an agreement between the parties for safety considerations after a burglary occurred at the family's residence a few months prior to the incident. As far as she was aware, the deceased lived with his mother. She testified that she was not aware that the deceased lived with Mr. Daniels or was involved in an extra-marital relationship with a particular lady when the incident occurred. She became aware of said facts after he died. Except for testifying that the plaintiffs were shocked by the deceased's demise and that it was difficult for the minor children to be bereaved of their father, no further evidence was led. She was informed of the incident on 14 June 2014. Since the incident, she and her children have been financially supported by her father and they still live with her parents in the two-bedroom unit they had moved into after the burglary.

[10] The second witness was Major-General Wiese. He is a retired member of the SAPS, and he was the Station Commander at the Brooklyn Police Station when the incident occurred. Major-General Wiese testified that he:

- i. Was informed on 13 June 2014 that someone shot himself in a SAPS vehicle that was parked near the police cells;
- ii. He went to the vehicle and found the deceased inside. The deceased was still alive, but it was evident that he was fatally wounded. Although he immediately called for an ambulance, there was nothing that could be done to assist the deceased;
- iii. He knew about the Standing Order ('the order'). His members knew of the order, and it was regularly impressed that members had to adhere to it;
- iv. He would always search a suspect that was handed over to him to ensure himself that the suspect did not carry any concealed weapons;
- v. He conceded during cross-examination that circumstances might arise or exist which may justify a member from not complying with the provisions of the standing order (he did not elaborate on what such conditions could be);
- vi. He stated during re-examination that he was not aware or informed of any such circumstances that existed in the present matter.

(iii) Evidence led on behalf of the defendant

[11] After the plaintiffs closed their case, the defendant applied for absolution from the instance. The application was dismissed, and the matter proceeded. The defendant called one witness, Mr. Anderson, the Security Manager at Menlyn Mall Shopping Centre.

[12] Mr. Anderson testified that he was employed by Leap Security, a branch of Fidelity Security, since 1995. Prior thereto, he was a sergeant in the SAPS. He resigned in 1993. He received training in the search of persons in his capacity as a member of the SAPS and during his training as a security officer. Thefts from and of motor vehicles are prevalent at Menlyn Mall Shopping Centre.

[13] As a consequence, joint operations between the members of the Brooklyn SAPS and security officers were frequently held to curb these thefts. Warrant Officer Rametsi, the SAPS member who received the deceased from the security officers, is one of the SAPS members who knew Mr. Anderson and participated in some joint operations. The SAPS members were aware that Mr. Anderson had been a policeman before joining Leap Security. On 13 June 2014, he arrested the deceased and another female suspect. He searched the deceased and found several items on his person. He called the SAPS and took the suspects to the security offices. Warrant Officer Rametsi arrived. Since the suspects were apprehended and handed over to the SAPS, they were never left alone and kept under surveillance by either the security officers or members of the SAPS. Both suspects seemed calm and co-operated. There was no indication that they would flee, and he elected not to handcuff the suspects or

lock them up. Upon the SAPS members' arrival, he confirmed to the members that he body searched the deceased and showed them the items found in possession of and confiscated from the suspects. The police transported the suspects to the Brooklyn police station. Despite the deceased having shot himself, members of the SAPS are still not searching persons arrested by the security officers at the Menlyn Mall Shopping Centre in all instances.

Submissions

(i) Submissions made on behalf of the plaintiffs

- [14] Plaintiffs' counsel submitted that Anderson's evidence indicated a systemic failure of following proper policing requirements when members of the SAPS arrest and detain suspects. Anderson did not properly search the deceased, given that the deceased had a firearm in his possession which Anderson did not find despite allegedly searching him. Having been informed that Anderson searched the deceased and that stolen items have been found in his possession and on his person, the SAPS members elected to ignore their duty to search the deceased upon their arrival or before placing the deceased alone in the back of the police vehicle.
- [15] In addition to the prescripts of the Standing Order, regard should be had that ss 23 and 42 of the Criminal Procedure Act, 51 of 1977 (the CPA) do not authorise security officials to body search persons arrested by them. Effectively, it should be accepted that every person arrested by a private person and handed over to the police has not been searched.
- [16] The SAPS members, who were bound to the Standing Order, omitted to comply with the provisions thereof, and the said omission was negligent and wrongful in the circumstances. The omission resulted in the SAPS members not finding the weapon and disarming the deceased. This failure led to the deceased killing himself. As a result, the plaintiffs suffered damages. The plaintiffs concede that the deceased contributed to his death and that their damages were caused by the joint wrongdoing of both the SAPS and the deceased but maintain that the deceased would not have been able to shoot himself on the day in question if he was searched and disarmed.
- [17] Counsel for the plaintiffs submitted that the defendant conceded during its argument for absolution that if the court finds that the Standing Order applies, the issues of negligence, wrongfulness, and causation would be akin to *res ipsa loquitur*. This is a misconception of the submissions made in the application for absolution. Counsel for the plaintiffs likewise erred in stating their heads of argument, on which they relied when they elected not to expand thereon during argument, that the only issue that remained in dispute was the issue of causation, which I specifically requested the parties to address me on. Although I requested the parties to address me on causation, it was not the sole issue that remained to be determined and certainly not conveyed to the parties as if it was the sole remaining issue in dispute.

[18] As far as the element of causation is concerned, the plaintiffs' counsel submitted that the question is 'whether the failure by the SAPS members involved contributed to the Plaintiff's damages.' They submitted that the failure to search resulted in the firearm not being confiscated and the deceased then killing himself. Counsel submitted that once the SAPS members failed to search the deceased in violation of the Standing Order, there was a real risk that harm would ensue. It was reasonably foreseeable that the deceased could be harmed and that his dependents would suffer damages. A factual causal link was established between the failure to search the deceased before transporting him and the consequences. As for legal causation, counsel submitted that the negligence of the police officers was linked sufficiently close to the loss suffered by the plaintiffs for legal liability to arise. Policy considerations do not militate against a finding that the police's conduct was the cause of the harm to the plaintiffs.

(ii) Submissions made on behalf of the defendant

[19] The defendant's main argument is that the provisions of the Standing Order are not, in light of the facts of the present matter, applicable. It was submitted on behalf of the defendant that the provisions of the Order do not create a statutory duty on a member to search a person in the event of the member not affecting the arrest. In the present matter, it is common cause that the deceased was arrested by the security officers and thereafter handed over to the SAPS. The defendant's counsel further submits that there is no evidence that *prima facie* establishes that after the arrest by security officers, the members had a statutory duty to search the deceased. The Standing Order is not applicable, and there is no reliance by the plaintiff on any other statutory or legal duty.

[20] Defendant's counsel submitted that if it is found that there was a statutory duty on the SAPS members to search the deceased, their failure to do so was, under the circumstances, not wrongful. Defendant's counsel additionally submitted that there is no evidence that any member acted negligently in breach of such statutory duty and that it was not foreseeable under the circumstances that the deceased would commit suicide. Counsel referred the court to the English decision of *Orange v Chief Constable of West Yorkshire Police*,^[1] where the Court of Appeal considered the duty of care towards a prisoner committing suicide whilst in police custody. The Court

stated at para 42:

'The consequence of Mr. Owen's argument is that every person taken into custody, whether police custody or the custody of the Prison Service, is to be treated as a suicide risk. We do not consider that that is the appropriate response of the court to the matter before us. There is no doubt that a custodian owes a duty of care to those taken into custody. As we have said, the duty is to take reasonable care of that person's health and safety. In determining the extent of that duty, it is clearly relevant to take into account the fact that there is an increased risk of suicide amongst prisoners. But that does mean that suicide is a foreseeable risk in relation to every prisoner. As Lord Hope said in *Reeves's case* [2001] 1 AC 360, 378, suicide can be both unforeseen and

unforeseeable. Nor do we consider that it would be fair, just and reasonable to impose upon either the police or the Prison Authorities a general obligation to treat every prisoner as if he or she were a suicide risk. The consequence would be an unacceptable level of control and precaution, not only as an obligation placed upon the authorities, but also as an imposition to the individual prisoner. ... Further, as he was not on the findings of the judge a person whom the officers knew or ought to have known to have been a suicide risk, he was not a person to whom the chief constable owed a duty of care to prevent him from taking his own life deliberately.'

- [21] Defendant's counsel submitted that the approach adopted in *Orange* recognises the fact that the foreseeability of a detainee taking his own life cannot merely fall under the umbrella of a general duty of care but requires that there must be some indication or special circumstances that will cause the reasonable man to foresee the possibility of suicide and take reasonable steps to prevent same. In the present case, there is no evidence that the deceased had any propensity to commit suicide or acted in a manner that could have created such an impression or alerted members to that effect. Coupled with these objective facts is the evidence that Anderson informed the members that he searched the deceased after his arrest, and the objects found in possession of the deceased were handed to the members. Counsel submitted that there is no evidence that the reasonable man would have foreseen that the deceased will commit suicide in the back of the police vehicle in these circumstances.
- [22] Regarding causation, counsel for the defendant submitted that no evidence justifies a finding on the balance of probabilities that the deceased would not have committed suicide if the members searched him. Counsel maintained that the intentional conduct of the deceased to commit suicide justifies a finding that the deceased would have done so irrespective of whether the firearm was found in his possession or not.
- [23] In reply, the plaintiffs' counsel submitted that the defendant's counsel's submissions centred around a general duty of care and emphasised that the plaintiffs' claim is not based on the police's general duty of care but specifically on the breach of the statutory duty created in the Standing Order.

Discussion

- [24] Standing Order (G), 341 is titled 'Arrest and the treatment of an arrested person until such person is handed over to the community service centre commander'. It is stated in the first paragraph of the Standing Order that arrest constitutes one of the most dramatic infringements of the rights of an individual. For this reason, the rules laid down, inter alia in the Standing Order, must be strictly adhered to. The provisions of the Standing Order do not apply to circumstances where people are removed and detained without actually being arrested, e.g., the detention of a mentally ill person in terms of the Mental Health Care Act, 17 of 2002, or the removal of a child in terms of the Children's Act 38 of 2005. It is stated that 'It is important to note that the provisions of this Order will not be applicable in those circumstances because, although the person is being detained, such person has not been

arrested by a member.'

[25] Clause 8 (4) of the Order is of particular relevance. It reads as follows:

'In terms of section 23 of the Criminal Procedure Act, 1977, a member may search an arrested person. The purpose of the search is twofold: to find any article that may be in such a person's possession and which could be used as evidence, and to find any article which such a person could use to injure himself or herself or any other person.

(a) 'Every arrested person must always, immediately upon his or her arrest, at least be searched to determine whether he or she has any concealed weapons on him or her.'

[26] Du Toit[2] explains with reference to case law[3] that an 'arrest' has taken place as soon as the arrestor assumes control over the movements of the arrestee. He continues:

'But if the person effecting the arrest is a peace officer, and he entertains a reasonable suspicion that a person has committed a First Schedule offence, it is not necessary that he intends to bring the arrested person before a court in order to charge him. It is sufficient in such circumstances to intend to detain the suspect in order first to investigate the case and then, depending on the result of the investigation, to either bring him before a court to be charged or release him.'[4]

[27] The defendant submitted that the Standing Order is not applicable because the deceased was already arrested before the police arrived on the scene. The defendant contends that it is clear from the wording of the Order that the purpose thereof is to regulate the procedure and conduct of members in the event of a person being arrested by a member. This contention is premised on the fact that paragraph 1 of the Order provides for the removal and detention of persons without such persons being actually arrested. I am of the view that the examples provided, namely, the removal of a child and the removal and detention of a mentally ill person explain the scope of the exception. These categories of people are not detained or arrested because they are suspected of committing crimes. Their rights are protected in the Acts that authorise their removal, and it cannot be equated to the arrest and detention of a suspect in terms of the Criminal Procedure Act. I disagree with the defendant in this regard.

[28] Counsel for the defendant submitted that s 23 of the Criminal Procedure provides a peace officer with a discretion whether to search an arrested person. This discretion, counsel submitted, should not be interpreted to be prescriptive. I disagree. The word 'may' as it is used in section 23 of the Criminal Procedure Act, read in context with the constitutional protection afforded an individual's liberty and freedom, and the remaining provisions of the Criminal Procedure Act pertaining to arrest, authorises and empowers a peace officer to search the person arrested and in so doing to infringe on the individual's right of liberty and freedom. Clause 8(4) of the Standing Order builds on this statutory authorisation and subsequently prescribes that 'every arrested person must always, immediately upon his or her arrest, at least be searched to determine whether he or she has any concealed weapons on him or her.'

[29] In *Botha v Minister van Veiligheid en Sekuriteit*[5] Kirk-Cohen J stated that the police's standing orders do not contain proposals. They record the minimum standards that a reasonable police officer must maintain.[6] These minimum standards are set by the defendant's own department and are mandatory. The defendant itself considers the orders in question to be required of the reasonable police officer.[7]

[30] In light of the meaning attributed to the verb 'arrest,' I am of the view that the defendant is splitting hairs when it submits that the SAPS members did not arrest the deceased and was thus not bound to follow the provisions of the Standing Order. The purpose of clause 8(4) of the Standing Order is to ensure that a person who has been arrested is not in possession of concealed weapons. When the wording of ss 23(1) and (2) of the Criminal Procedure Act are considered, it is evident that the legislature differentiated between situations where the person executing the arrest is not a peace officer, and where the arrest is affected by a peace officer. In the former situation, the arrestor is only empowered to seize an article referred to in s 20 of the Act which is in possession of or under the control or in the custody of the person arrested. He is not statutorily empowered to search the person. Where a suspect is arrested by a person who is not a peace officer, and then to be transported to the police station by a peace officer the obligation to search such person 'upon his or her arrest' arises. The aim of the search is to ensure that the arrestee does not have any concealed weapon, and when the peace officer arrives at the scene it is the first opportunity for the arrestee to be searched 'upon his or her arrest'. I am of the view that a statutory duty is created in clause 8(4) of the Standing Order obliging SAPS members to search an arrestee for concealed weapons, even when they receive the arrestee after a civilian arrest was effected.

[31] It is common cause that the SAPS members omitted to conduct a body search on the deceased. In light of my finding that they were duty-bound to conduct a body search when they took over custody of the deceased, their failure to do so satisfies the conduct element required for delictual liability in that it amounts to an omission. The question that arises is whether the omission was wrongful and whether members acted negligently when they failed to search the deceased before transporting him to the police station. Due to the conclusion I came to after considering the evidence as set out below, it is assumed for argument's sake that the omission was wrongful.

[32] Negligence, if proven, will satisfy the fault element required for delictual liability. Nugent JA confirmed in *Minister of Safety and Security v Van Duivenboden*[8] that:

'Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied in this court in *Kruger v Coetzee*.'

In *Kruger v Coetzee* the Appeal Court held that:[9]

'For the purpose of liability culpa arises if-

- (a) A diligens paterfamilias in the position of the defendant –
 - i. Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - ii. Would take reasonable steps to guard against such occurrence; and
- (b) The defendant failed to take such steps.'

[33] Major-General Wiese testified that circumstances might arise that will have the effect that adherence to the Standing Order might be deviated from. Major-General Wiese's evidence in this regard merely confirms the ex lege position – mere non-compliance with a Standing Order without regard to the circumstances cannot be held to constitute negligence. The question is whether it can be found that a diligens paterfamilias in the position of the SAPS members on 13 June 2014 at Menlyn Mall Shopping Centre would reasonably have foreseen the possibility of their omission causing injury to the deceased.

[34] The evidence before the court is that the deceased was calm subsequent to his arrest by the security officers and his subsequent detention by the police after being handed over to them. He co-operated during his interaction with both the security officers and the SAPS members. Nothing he did indicated or alerted that he might harm himself, or anybody else. He was body searched by Anderson, an ex-policeman and security officer who underwent training in searching suspect on several occasions when still a member of SAPS and thereafter as a security officer, and had experience in searching suspects. Anderson and, amongst others, Warrant Officer Rametsi, have conducted joint operations regarding theft from motor vehicles and motor vehicle theft at the Menlyn Mall Shopping Centre for approximately the past two years. They established a close relationship. The SAPS members from the Brooklyn Police Station, including Warrant Officer Rametsi, knew that Anderson was a sergeant in the police service until he

resigned. Anderson informed them that he searched the deceased, and the items that were seized from the deceased were handed over to them. It was put to Anderson during cross-examination that he did not conduct a thorough search, for if he did, he would have found the concealed weapon. He emphatically denied this. No evidence was led as to how the deceased should have been searched viz-a-vis how he was searched.

[35] The diligens paterfamilias in the present matter, is the diligens SAPS member. The reasonable SAPS member is one that maintains the standards set in the Standing Order as the required standards. The requirement that an arrestee is searched does not hang in a vacuum. The Standing Order requires that an arrestee 'at least be searched to determine whether he or she has any concealed weapons on him or her' in the framework of s 23(2) of the Criminal Procedure Act providing that 'the person making the arrest may place in safe custody any object found on the person arrested and which may be used to cause bodily harm to himself or others.' The possibility of an arrestee causing bodily harm to himself or herself is a reality that the legislature deemed fit to mention specifically. As such, this

possibility would always be in the reasonable arresting officer's mind. It cannot be said that it is not in general reasonably foreseeable that an arrestee might, at least attempt, to cause injury to himself.

[36] In the present case, the uncontested evidence however proves that the deceased was searched by a competent and experienced security officer upon his arrest. Amongst others, remote motor vehicle locking systems were found in his possession. The fact that he was searched was communicated to the police officers with whom the security officer concerned have built a close relationship over the past two years. The proof of a search, the seized items, were handed over to

the police. Although s 23(1)(b) does not empower a person who is not a peace officer to search an arrested person, it is evident that Mr. Anderson was of the view that he was authorised in terms of the Criminal Procedure Act to conduct body searches of suspects, and indeed conducted same. After he was searched, the deceased was under the constant supervision of either a security officer or a SAPS member until he was loaded into the police vehicle.

[37] Major-General Wiese testified that it happens that arrested persons, who were searched by police officials, end up in the police cells in possession of concealed weapons. This evidence is indicative thereof that it cannot be assumed that Anderson's search was not thorough merely because the deceased was in possession of his friend's firearm. It was not put to Anderson during cross-examination how he should have conducted the search differently to yield different results, or how a search conducted by him differs from how the police officers would or should have done it. It was also not indicated to this court how the police officials would have done it differently than Anderson if they had conducted a body search.

[38] In the factual circumstances of this case, it cannot be said that it was foreseeable that a suspect would be in possession of a concealed weapon, or that he had an inclination to injure himself, and as a result fault cannot be attributed to the SAPS members' failure to search the deceased when they took him into their custody. The SAPS members' failure to search the deceased constituted a dereliction of duty, but I cannot find in the circumstances that it constitutes negligence as required for delictual liability.

[39] In the event that I am wrong, it is necessary to reflect on causation. Counsel for the plaintiff submitted that the defendant's members' failure to search the deceased before they transported him to the police station, was a sine qua non for his death, and thus the plaintiff's damages.

[40] The learned Nugent JA explained in Van Duivenboden:[10]

'What remains to be considered is whether that negligence was a cause of the respondent being shot. In *International Shipping Co (Pty) Ltd v Bentley* it was pointed out by Corbett JA that causation involves two distinct enquiries. The first enquiry is whether the wrongful conduct was a factual cause of the loss. The second is whether in law it ought to be regarded as a cause. Regarding the first enquiry he said the following:

'The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine

whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the loss; *aliter*, if it would not have ensued.'

[25] There are conceptual hurdles to be crossed when reasoning along those lines for, once the conduct that actually occurred is mentally eliminated and replaced by hypothetical conduct, questions will immediately arise as to the extent to which consequential events would have been influenced by the changed circumstances. Inherent in that form of reasoning is thus considerable scope for speculation which can only broaden as the distance between the wrongful conduct and its alleged effect increases. No doubt a stage will be reached at which the distance between cause and effect is so great that the connection will become altogether too tenuous, but, in my view, that should not be permitted to be exaggerated unduly. A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.' (Footnotes omitted).

[41] The 'sensible retrospective analysis of what would probably have occurred' cannot be divorced from the evidence presented in the case. The approach of the Appellate Division, as it was then known, in *S v Van As and Another*,^[11] is informative. In *Van As*, the appellants were police officers who arrested one M.^[12] While they had been engaged in locking M in a patrol van, the five young children in M's custody, who were scantily dressed and of poor physique, had disappeared. On the following morning two of the children had been found dead from exposure to cold and rain. On a charge of culpable homicide, the State contended that the circumstances of M's arrest had placed the appellants in such a relationship to the children that they had been under a legal duty to take reasonable precautions for the children's safety, which they had failed to do. The trial court convicted the appellants of culpable homicide. The Appellate Division overturned the finding and held that it had not been proven that the children would have been found by the kind of search that a reasonable person would have made in the circumstances. Accordingly, a causal connection between the appellant's omission and the children's death had not been sufficiently established.

[42] In the present matter, there is no evidence before the court that indicates that the probability exists that a concealed weapon would have been discovered if the SAPS members conducted a body search on the deceased prior to transporting him to the police

station in the back of the police vehicle. The contrary is true, as alluded to above, inter alia because the deceased was searched by an experienced security guard who was previously employed by the SAPS. As a result, the plaintiffs did not prove on a balance of probabilities that the harm would have been averted by a search of the deceased by the SAPS members because the causal requirement is not satisfied.

[43] I indicated that I would deal with the reason why I dismissed the application for absolution in this judgment. For present purposes it is sufficient to refer to the principle as enunciated by Van Loggerenberg in Erasmus Superior Court Practice:[13]

‘In the case of an inference the plaintiff at the close of his case need not necessarily persuade the court hearing the application that there exists an actual preponderance of probability in his favour. The test at this stage of the trial is as follows: the court will refuse the application for absolution unless it is satisfied that no reasonable court could draw the inference for which the plaintiff contends. The court is not required, in the case of an application for absolution at the end of the plaintiff’s case, to weigh up different possible inferences, but merely to determine whether one of the reasonable inferences is in favour of the plaintiff.’

ORDER

In the result, the following order is made:

1. The plaintiffs' action is dismissed, with costs, which costs include the costs of two counsel

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 29 October 2021.

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Date of the hearing: 4

– 6, 13 October 2021

Date of judgment: 29

October 2021

[1] [2001] OB 347.

[2] Du Toit, E, et al. Commentary on the Criminal Procedure Act. Juta, RS 66 2021.

[3] R v Mazema 1948

(2) SA 152 (E); State President & others v Tsenoli; Kerchhoff & another v Minister of Law and Order & others 1986

(4) SA 1150 (A) 1186C–D; Willie v Minister of Police & others (unreported, FB appeal case no A170/2019, 8 June 2020) at [10].

[4] Du Toit, supra, RS 64, 2020 ch5-p3.

[5] 2003

(2) SACR 423 (T)

[6] 436I-J.

[7] 437C-D.

[8] 2002

(6) SA 431 (SCA) par [12].

[9] 1966

(2) SA 428 (A).

[10] At par [24] – [25].

[11] 1967

(4) SA 594 (A).

[12] The summary of the facts is taken from P Q R Boberg, The Law of Delict, 1984 JUTA & Co, 254-255.

[13] Vol 2, Service 6, 2018, D1-531.

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