

SOUTH AFRICA / JUDGMENT

Leepile v The Minister of Police (2585/2014) [2015] ZAGPPHC 678 (18 September 2015) [2015] ZAGPPHC 678

COURT

North Gauteng High Court, Pretoria

BEFORE

Mogotsi

CASE / FILE NUMBER

2585/2014

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REPUBLIC OF

SOUTH AFRICA

IN THE HIGH

COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE NO:

2585/2014

18/9/2015

NOT

REPORTABLE

NOT OF

INTEREST TO OTHER JUDGES

REVISED

In the matter between: MERRIAM MMAMOLEFE
 LEEPILE
 PLAINTIFF
 And
 THE MINISTER OF
 POLICE
 DEFENDANT

Date heard: 04/08/2015

Date delivered: 18/09/2015

JUDGMENT

MOGOTSI A J

Introduction

- [1] This is an action by the Plaintiff for damages (in an amount of R500 000) against the Defendant.
- [2] The question is whether the Minister of Safety and security (Minister) should be held vicariously liable for the damages arising from the burning of the Plaintiff's house by members of the community during service delivery protests which took place on 13th June 2012.
- [3] The cause of action that gave rise to the Plaintiff's claim against the Defendant is based on an omission by members of the South African Police Service (herein referred to as SAPS).
- [4] In determination of that question the states, obligation to respect, protect and promote the citizen's right of freedom of movement, residence, housing and occupation would have to be considered. Relevant to that would also be to take into account the importance of the role of the police service in a constitutional democracy namely to protect and secure the inhabitants of the Republic of South Africa's properties, to uphold and enforce the law.
- [5] The Defendant is defending the action.
- [6] The parties have agreed that the onus rests on the defendant.

The Parties

- [7] The Plaintiff is Ms Merriam Mmamolefe Leepile and adult female ward seven's (7) councillor and a resident of house no [...] Extension [...], Imperial Reserve, Mahikeng, North West Province (hereinafter referred to as the plaintiff).

- [8] The Defendant is the Minister of Police with his legal and secretarial office situated at Wachthuis, 7th floor 231. Pretorius Street, Pretoria. The Defendant is cited in his official capacity as provided for in s 34 of the General Law Amendment Act, 1955 (Act no 62 of 1955) read with s 2 of the state Liability Act, 1957 (Act no 20 of 1957)

ISSUES

- [9] Whether there were members of SAPS protecting Plaintiff's house at 17:00 on 13 June 2012 or not. (The time estimated to be when the plaintiff's house was set on fire). Did SAPS members come to the rescue of the plaintiff or other people whose life and property were threatened?
- [10] Alternatively, whether there was contributory negligence on the part of the Plaintiff who did not request redeployment or apply for special authority (VIP Protection) through the SAPS or her own office to secure her house more so that she had been aware since her appointment as a councillor in 2011 that the community does not want her.

Jurisdiction

- [11] The whole action arose in Mahikeng. The defendants' offices are in Pretoria and jurisdiction has been agreed to.

Background

- [12] As at the time of the incident the plaintiff was a councillor of Ward seven (7) which includes extension 38 of the Imperial reserve in Mahikeng. She was also a member of the mayoral committee on public safety and security.
- [13] These were service delivery complaints (in particular lack of electricity) in certain houses which led to members of the community embarking on sporadic violent protest from April until June 2012.
- [14] It is common cause that during April 2012 the Plaintiff informed members of the SAPS including Brigadier Moatshe that the said service delivery protests would culminate in the burning of more or less fourteen (14) houses belonging to ward councillors (including the plaintiff's house). The date and time for such activity was not known to the Plaintiff.
- [15] It is further common course that the Plaintiff met with Major Kgosana and gave him information about threats to burn her house and the names of the suspects. The information was relayed to colonel Serfontein of Crime Intelligence Unit, Brigadier Moatshe and Lieutenant Colonel Masilo who was the overall commander of public order police unit.

[16] The information about violence and burning of the different counsellors houses was further discussed and shared in a meeting which was amongst others attended by the commanders of police units such as Crime Intelligence Unit, K9, 10111, detective branch and public order policing. It was in that meeting where it was resolved that commanders of the police stations where the house are situated will see to it that patrol duties around the house are carried out. To that extent, measures were agreed upon

to protect the houses appearing in that list.

Plaintiff's evidence

[17] The Plaintiff was further assured that people will be sent to the community meetings to gather more information. Furthermore, she was assured that there will be a plan (the details of which could not be discussed with her as a civilian) which was going to be carried out to avoid such happenings. As a result of all these the plaintiff got satisfied; she believed and trusted that the SAPS members will offer her the necessary protection.

[18] As a politician she was also afraid of being seen as interfering in the execution of other state organs duties. In addition to that she respects the law and law enforcement officers. That is why she saw it fit to give the police "space" to perform their duties as she was afraid to "bum her fingers" should she be found to be interfering with the proper administration of justice.

[19] She was a member of (CPF) Community Policing Forum at that time and she would also attend meetings with cluster commanders of the police units mentioned in par [16] above and she was satisfied that from the discussions held, she had done enough to be protected.

[22] It never occurred to her that she could out of her own accord obtain VIP protection from SAPS itself or from the municipality.

[23] On 12 June 2012 she had to attend a community meeting with intention of giving feedback on the electrification of houses in her ward.

[24] She was held hostage in that meeting. Colonel Masilo was contacted and informed about her plight and he sent police officers who rescued her.

[25] On 13 June 2012 during the day and while still at her work place, the Plaintiff received information about protests in extension 38, which is her area.

[26] She telephonically informed colonel Masilo, Captain Gaobodiwe, Brigadier Moatshe and Lieutenant Motaung all being members of SAPS. According to the Plaintiff, Captain Gaobodiwe just dropped the phone in her ears and said "she is tired of Municipality employees".

[27] Around 19:30-20:00 pm the Plaintiff received information telephonically from among others Lesego Molehabangwe that her house was on fire.

[28] Lesego Molehabangwe testified and briefly confirmed that he is the plaintiff's neighbour. On 13 June 2012 he came back from work at around 17:00pm. At that time there were no police officers guarding or patrolling the plaintiff's house. Later on the protestors set the plaintiff's house on fire and it burnt down completely.

Defendant's evidence

[29] SAPS members attached to public order police unit together with their commander Colonel Masilo testified. Colonel Serfontein, the head of crime intelligence unit testified as well.

[30] Colonel Masilo confirmed that the police cluster commanders were given information about the impending violence and possible burning of the counsellor's houses. He however, did not tell his juniors who were doing patrol duties on that fateful day as it was "agreed that the police station commanders in whose arrears the houses are situated will be responsible for doing patrols". On 13 June 2012 he was not in Mahikeng.

[31] Other members of public order police unit Captain Gaobodiwe, Lieutenant Mokadi Motaung testified that on 13th June 2012 they were doing patrol duties as there were violent protests regarding service delivery. They were busy removing barricades and dispersing crowds. In the process of doing so they used teargas and rubber bullets.

[32] Nobody informed them about the threats to the plaintiff's house. They did not know the house. They only became aware of the threats and a list of councillors' houses which were to be burnt by the community on 14th June 2012 that is a day after the plaintiff's property was burnt down. Captain Gaobodiwe denied dropping the Plaintiff's call.

[33] Colonel Serfontein, the commander of Mahikeng crime intelligence unit testified and said he knew about the threats and a list of councillors' houses which were allegedly going to be burnt. He shared that information with other commanders of different units referred to in par 16. It is not his units' responsibility to guard houses or to do patrols.

The Law

[34] Vicarious liability is generally defined as "the strict liability of one person for the delict of another".[1]

[35] Any possible enquiry into the possible vicarious liability of the employer should necessarily start by asking whether there was a wrongful, culpable act committed by the employee. If not there can neither be direct liability of the employee or vicarious liability by the employer. [2]

[36] In order for the employer to be vicariously liable an employment relationship must exist at the time when an employee committed the delict and the employee must have acted within the scope of his employment.[3]

[37] There should be some nexus between the employee's wrongful conduct and the relationship between him and the employer.

While elaborating on a question of whether the employer could be said to have been engaged upon the business of his employer the court said “if the servants abandonment of his master’s work amounts to mismanagement of it or negligence in its performance and is in itself the cause of harm to third parties, then the master will naturally be legally responsible for that harm. If, on the other hand, the harm to a third party is not caused by the servant abandonment of his master’s work but by his activities in his own affairs, unconnected with those of his master then the master will not be responsible”.^[4] Furthermore according to the Salmond test (cited by Greenberg JA “a master ... is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorised that they might rightly be regarded as modes although improper modes of doing them.”^[5] et 741 the court further said “...a master who does his work by the hand of a servant creates a risk of harm to others if a servant should prove to be negligent or inefficient or untrustworthy; that because he had 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 his work ...”

[38] Under the Police Act 58 of 1995 the functions of the police include the maintenance of law and order and the prevention of crime. The police services is thus one of the primary agencies of the state responsible for the discharge of its constitutional duty to protect the public and in general and women in particular against invasion of their fundamental rights by the perpetrators’ of violent crime.^[6]

[39] Section 205(3) of the Constitution defines the duties of the South African Police Services as including preventing combat and investigating crime, to maintain public order, to protect and secure inhabitants of the Republic and their property and to uphold the law”.^[7]

[40] The constitutional court held in both *Baloyi* (par 13)^[8] and *Carmichele* (par 62) that the estate is furthermore obliged under international law to protect women against violent crime, and against the gender discrimination inherent in violence against women and article 2 of the convention on the elimination of all forms of discrimination against women.^[9]

[41] In *Van Duijn* the majority of this court emphasised (para 20) that the very existence of the state’s constitutional duty to act in protection of the rights in the Bill of Rights necessarily implies the norm of public accountability and pointed out that section 41(1) of the Constitution expressly provides that all spheres of government which is not only effective, transparent and coherent, but also government which is accountable.^[10]

[42] Our common law employs the element of wrongfulness (in addition to the requirements of fault, ... and harm) to determine liability for delictual damages caused by an omission. An omission is wrongful if the defendant is under the legal duty to act positively

to ... 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.

- [43] Whether it is reasonable to have expected of the defendant to have done so the courts make a value judgment inter alia based upon its perception of the legal convictions of the community and on considerations of policy.
- [44] 'in considering the concept of the legal convictions of the community the court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must further be seen as the legal convictions of the legal policy makers of the community such as the legislative and judges. See *Schultz v Butt* 1986 (3) SA 667 (A) 679D-E and *Premier Hangers CC v Polyols (Pty) Ltd* [1996] ZASCA 119; 1997
- (1) SA 416 (A) 422E-F.
- [45] It is also in the matter of *Van Duivenboden*[11] where it was held that certain police officers who were in possession of information that reflects adversely upon the fitness of a person to possess firearms have a legal duty to members of the public to take reasonable steps to act on that information in order to prevent harm. In a minority judgment Marais JA concluded that in the particular circumstances of that case the police were under a legal duty to act even on an application of the traditional test for delictual wrongfulness and that it is not necessary to have regard to the constitution.

Evaluation of the evidence

- [46] From the evidence tendered it is common cause that there were sporadic violent protests for a period of approximately two months before the Plaintiffs' house could be set on fire.
- [47] There were threats to burn councillor's houses. Names of suspects and information about these threats were handed over to the senior management of SAPS. As a result of which and undertaking was made to the Plaintiff that her house will be protected.
- [48] There is no shred of evidence to suggest that even a slightest step was taken to monitor the plaintiff's property.
- [49] The defendants counsel towards the end of the case conceded that he has no defence on the main and alternative pleas.
- [50] The commanders of different units who had crucial information about the possible burning of the house of the plaintiff never informed members of public order police unit who were doing patrols and crowd management on that particular day.
- [51] Members of public order policing unit who testified said had they been made aware and went and patrolled ... to the plaintiff's house it is likely that protestors would have fled the scene.
- [52] Contrary to the pleadings all the police officers who testified stated clearly that they were not at the plaintiff's house on that day.

[53] Regarding the contention that the Plaintiff could have minimised and/or avoided the damage to her property by requesting a redeployment or in the alternative requested or applied for special authority (VIP protection) through SAPS or her own office to have her house secured it should be remembered that the plaintiff never lost faith or trust in the capability of SAPS to protect

inhabitants of South Africa and their properties and in particular herself.

[54]She was adamant that as a politician she did not want to interfere or to be seen to be interfering. She believed that as SAPS members were promising to assist her she was supposed give them space to perform their duties.

[55] In any event the units which according to the Defendant ought to have protected the Plaintiff are also SAPS members or its branches. They should have shared the information they had among themselves and protected her property.

[56]In the circumstances the court is satisfied that the defendant has no defence in law and he could not discharge the onus placed on him on both the main and alternative plea.

[57]The above evidence is sufficient to render the defendants omission wrongful in law, the defendant has also conceded that a draft order made by the plaintiff s counsel be made an order of this court.

Order

I then make the following order:

1. The aspect of the quantum is postponed sine die;
2. The defendant is ordered to compensate plaintiff for 100% of her damages to be proven or agreed at a later stage, as a result of the incident which occurred on 13 June 2012 as per the plaintiff s particulars of claim;
3. The defendant is ordered to pay the plaintiff's costs of suit to date on a High Court party and party scale as agreed to be taxed, which costs include (but not limited to);
 - 3.1. The costs of counsel (including preparation, perusal, consultations and day fees for 19, 24, 25 and 26 August 2015 as per invoice);
 - 3.2. The costs of attorneys (instructing and correspondent attorneys) including preparation, perusal, travelling expenses, consultations and day fees for 19, 24, 25 and 26 August 2015;
 - 3.3. Costs of the plaintiff and plaintiff's witness in attending trial and consultations, inclusive of travelling and accommodation expenses and all associated expenses.

4. Should the defendant fail to pay the plaintiff's party and party cost as taxed or agreed within 30 (thirty) days from the date of taxation, alternatively date of settlement of such costs, the defendant shall be liable to pay interest at a rate of 9% per annum. Such costs as from and including the date of taxation, alternatively the date of settlement of such costs up to and including the date of final payment thereof.
5. Such costs to be paid by the defendant into the trust account of Gildenhuys Malatji Incorporated, Absa Bank, Brooklyn Branch, account number [...], branch code [...] under reference: G Erasmus/T Vlok /01715453

MOGOTSI

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:

24, 25 and 26 August 2015

For the Plaintiff: Adv. JC van Eden

Instructed by:

Gildenhuys Malatjie Inc.

For the Defendant: Adv. A Moja

Instructed by:

Mr. A. Masenamela/State Attorney

Date of Judgment: 18/09/2015

[1]Neethling, Potgieter & Visser Law of Delict

(2010) 365

[2] Ibid

[3] Mkhize v Martens 1914 AD 382 - 390

[4] Feldman v Mall 1945 AD 733 at 742

[5] Ibid

[6] Case no 176/2001 Ghia van Eden (formerly Wades) v Minister of Safety and Security (Reportable)

[7] Republic of South Africa Constitutional Act 108 of 1996

[8] Ibid pl2

[9] Ibid pl2

[10] Ibid

[11] Minister of Safety and Security v Van Duivenboden unreported case no 209/2001 dated 22 August 2002

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Prepared on 14 October 2026 · Esheria