

SOUTH AFRICA / JUDGMENT

Ramango and Another v Mashamba and Another (29384/2011, 29542/2011,29534/2011) [2013] ZAGPPHC 418 (4 December 2013)

[2013] ZAGPPHC 418

COURT

North Gauteng High Court, Pretoria

BEFORE

Hiemstra

CASE / FILE NUMBER

29384/2011, 29542/2011,29534/2011

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REPUBLIC

OF SOUTH AFRICA

IN

THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA,
PRETORIA

Case

numbers: 29384/2011 29542/2011 29534/2011

Date:

3 December 2013

Not

reportable

Not

of interest to other judges

In

the matter between:

NNDANDULENI
PATRICIA RAMANGO.....FIRST
PLAINTIFF
in
her personal capacity and o.b.o.
O.....
J.... M.....
and
P.....
J..... M.....
MASILO
MAKGAKGA.....SECOND
PLAINTIFF
TAKALANI
FREDDY MASHAMBA.....FIRST
DEFENDANT
MINISTER
OF POLICE.....SECOND
DEFENDANT

JUDGMENT

HIEMSTRA AJ

INTRODUCTION

- [1] There are three matters before court, all concerning the fatal shooting of a certain Rudzani Thelma Mashamba (the deceased) by the first defendant. The deceased was the former wife of the first defendant. The first defendant was convicted of the murder of the deceased and sentenced to life imprisonment. The first defendant was at the time of the murder an Inspector in the South African Police Service (SAPS).
- [2] The first plaintiff is the aunt of the deceased. She sued the defendants in her personal capacity under case number 29384/2011 for damages suffered as a result of shock and trauma. She is the legal guardian of the two children of the deceased. Under case number 29542/2011, she sued on behalf of a minor son born out of the marriage between the deceased and the first defendant, O... J... M..., for loss of support. The second plaintiff was married to the deceased at the time of her death. He sued the defendants under case number 29543/2011 in his personal capacity for loss of support as well as in a representative capacity on behalf of P.... J.... M..., a minor son born of his marriage to the deceased. I must mention at this stage that the validity of the marriage between the second plaintiff and the deceased is in dispute.
- [3] At a pretrial conference held on 15 October 2013, the parties agreed to consolidate the three matters under the above case number and that the first plaintiff would henceforth act on behalf of both the minors, having been appointed as their legal guardian by the Limpopo

High Court on 16 April 2009. The second plaintiff henceforth acted only in his personal capacity. The parties further agreed that the issue of the liability of the defendants be separated from the determination of the quantum of damages in terms of Rule 33(4). I accordingly made such an order.

- [4] On 29 May 2008, the first defendant, Takalani Freddy Mashamba, shot and killed the deceased, his wife, with his service pistol on the premises of the Makhado Police Station, Limpopo Province. He was not on duty at the time of the murder. He admitted liability to the first plaintiff for her personal loss and the loss of support of the two minor children. In issue remains the vicarious liability of the second defendant, the Minister of Police. The claim of the second plaintiff in his personal capacity for loss of support must also be decided.

THE EVIDENCE

- [5] As I have mentioned, the first plaintiff is the aunt of the deceased, being her mother's sister. She knew the deceased from

childhood. After the death of the deceased's mother, the deceased lived with the first plaintiff until she had passed matric.

The first plaintiff is a teacher by profession. She had a close relationship with the deceased and regarded her as a daughter. She is the executrix in the estate of the deceased and, as I have said, she is the guardian of the deceased's minor children. The older of the two children, O....J.... M....., is the son of the first defendant and the deceased. The second son, P.... J.... M....., was born from the deceased's marriage to the second plaintiff, Masilo Makgakga.

- [6] At the age of 17, the deceased married the first defendant in community of property, against the wishes of the first plaintiff and her grandmother. After her marriage she went to live with the first defendant in Makhado. The deceased did not work, but received an income from her late mother's pension. For some reason the pension dried up. The deceased then tried her hand at certain

businesses, such as a café and a saloon. However, she and the second defendant began to experience financial difficulties. This in turn resulted in domestic quarrels. The deceased told the first plaintiff that she and the second defendant had argued about the second defendant's extra marital affairs and that he had assaulted her. The deceased and second defendant visited the first plaintiff from timetotime and discussed their marital problems with her. The first plaintiff urged them to resolve their differences. During 2005 the couple separated. The first defendant gave the deceased a bakkie and she went to live with her father, Mr Charles Magaga in a village named Vleifontein, about 20 km from Makhado. Their house was few houses from the home of the first plaintiff.

- [7] The couple were divorced during 2006. The decree of divorce included an order for the equal division of the joint estate. Since the divorce the deceased and the first defendant had been in constant conflict about the division of the estate. The first defendant seems to have been outraged about claims that the deceased had made to certain assets of the joint estate. It is a

recurring theme in police statements made by the first defendant and other utterances, to which I shall return in due course. In a letter, addressed to “Any Authority”, which his son had delivered to the first plaintiff about a week before the fatal shooting, he said inter alia:

“I will never share my assets with someone who attempted to assassinate me. To any authority who justified this, please forgive me, I won't comply with this instruction rather kill or detain me in lawful custody. All my estates are for my children and not for the vultures. I swear and give an oath from my inside that those assets are mine and my children. I will fight this war until God will come and take me.”

- [8] Mr Charles Magaga, the father of the deceased, testified that during 2006, while the deceased and the first defendant were engaged in divorce proceedings, the first defendant came to his workplace. He said to Mr Magaga that in the event of him losing any of his properties, he would kill the deceased. He was aware of the disputes about the joint estate and took the threat seriously. He rushed to the deceased's home and told her about the threat. He and the deceased went the next day to the Makhado Police station where the first defendant had been stationed, and reported the matter to the station commander. The station commander immediately attempted to contact the first defendant, but could not locate him. She promised to find him and to confiscate his service pistol. Later the deceased reported to him that the station commander had indeed confiscated the first defendant's firearm.
- [9] The first plaintiff testified that the deceased had laid several criminal charges against the first defendant between 2005 and 2008 for assault and intimidation. However, none of the charges led to prosecution, either because the deceased withdrew the charges or because the prosecuting authority declined to prosecute. The second defendant made discovery of police dockets in three cases where the deceased had laid charges. I shall deal briefly with each case.

[9.1] On 28 November 2005 she made a statement to the SAPS at Makhado in which she claimed that the first defendant had threatened to go to a witch doctor and that she would die. The prosecutor declined to prosecute.

[9.2] On 24 April 2006, the deceased declared to the SAPS that the first defendant had assaulted her by hitting her with the fist after complaining that she had allowed her brother to drive the bakkie which the first defendant had given to her. The deceased

withdrew this charge, according to her because they had resolved their difference.

[9.3] On 26 April 2007 she laid a charge of intimidation against the first defendant after having received several threatening sms'es.

The texts of the messages are quoted, but they are in such poor English that they make little sense. It is, however, apparent from

the messages that the first defendant intended to fight for his assets to death. There are also implied threats to the life of the deceased. According to the docket the case had been “withdrawn by the court.”

- [10] The first plaintiff testified that the deceased had told her one day in 2008 that the first defendant's firearm had been returned to him. She and the deceased were very scared and since that day never travelled alone.
- [11] The first plaintiff testified about more threats to the life of the deceased. One day the first defendant called her and said he wanted to talk to her. He drove to her home and asked her to climb into his car. In the car he told her that he had a new girlfriend and said that the deceased must leave the girlfriend alone, or he would kill her. She must also stop trying to acquire his property.
- [12] Counsel for the second defendant put to the first plaintiff that the deceased had during 2005 fired a shot at the first defendant.

The first plaintiff responded that she knew of an incident where a neighbour had phoned her and told her that they had heard a shot from the home of the deceased and the first defendant. The neighbour told her to rush to the clinic. She went and found the deceased there in a state of hysteria. The deceased told her that the first defendant had shot at her, but had missed. This dispute of fact cannot be resolved on the evidence.

- [13] On the night before the fatal shooting, the first plaintiff attended a meeting at the school in Makhado where she had been a teacher. During the meeting, a lady by the name of Idah Ramuthela, who worked at the Makhado Police Station as a filing clerk, phoned her and said that the deceased had asked her to tell her that the first defendant had been prowling in the neighbourhood and wanted to kill everybody. According to Ms Ramuthela, the deceased had urged the first plaintiff not to go home. After the meeting she had to take some of the attendees to their homes in her motor vehicle. While driving, the deceased phoned her and told her that the first defendant had turned up at her home and had shone a torch into the house. She had earlier received a call from someone at a tavern who had told her to hide because the first defendant was going to kill her. She told the first plaintiff that she was hiding at the home of the nextdoor neighbours. After dropping her colleagues off at their homes, she drove to the Waterval Police Station. There she asked police officers to escort her to the Vleifontein satellite police station, which is a few houses away from her home. They duly escorted her there. At the Vleifontein satellite station, she reported to Warrant Officer Calvin Rambau, who was the relief station commander, what had happened. She said that Rambau had been rude to her and made a fool of her. He asked if she had proof of the threats and she said that she had a letter from the first defendant in which he had made

threats as well as sms messages, but that they were at home. He told her to fetch them. She asked for someone to escort her to her home, but Rambau refused. She then left the station by foot. Too scared to go by road, she climbed over various fences to get to her home. She returned to the police station and showed the letter to the warrant officer. He read it and said, "you see, women want what they had not worked for." He said that the letter contained no threat and told her to go home. She left and went home by the same route.

[14] Warrant Officer Rambau was called by the second defendant to testify. He confirmed that the first plaintiff had arrived at the satellite

station, escorted by policemen from Waterval. According to him, he had been very courteous to the first plaintiff and had taken her story seriously. He promised to patrol the area throughout the night and to look for the first defendant. He said that he had duly done so, but never encountered the first defendant. He denied that the first plaintiff had left by foot and had scaled the fences between houses to get to her home. He said that she had driven her own vehicle and returned later by car with the letter. He said he had radioed the Makhado Police Station and asked that someone go to the first defendant's home to see if the first defendant was there. He said that Makhado later reported that the first defendant had not been at home. He did not request the Makhado Police to search for the first defendant, or to stake out his home. He was asked whether he had attempted to call the first defendant on his cell phone, and he said he had not thought of that.

[15] Significantly, the visit and requests of the first plaintiff had not been recorded in the Occurrence Book at Vleifontein. Rambau said he had recorded it in his pocket book, which he no longer had.

THE SECOND PLAINTIFF

[16] The second plaintiff, as I have said, was allegedly married to the deceased at the time of her death. The second defendant did not admit the marriage and put the second plaintiff to the proof thereof. He testified that he had been married in terms of customary law and had paid lobola. The marriage was never registered with the Department of Home Affairs. He was questioned about the conclusion of the marriage and he described a process whereby delegations of the respective families had negotiated the terms of the marriage and the lobola to be paid. The family of the deceased had brought the deceased to his family and some sort of ceremony was held. It is not a requirement of the Recognition of Customary Marriages Act 120 of 1998 that a customary marriage be registered with the Department of Home Affairs. As there was no evidence to contradict that of the second plaintiff, I must accept that he had indeed been married to the deceased.

[17] The question is, however, whether he was a dependant of the deceased and therefore entitled to be compensated for loss of support. He testified that the deceased had supported him financially during the marriage because he had been unemployed. He testified, however, that before the marriage, he had been a sales manager. He is now a sales consultant with another company. In my view he was not a dependant, although the deceased might have supported him from time to time while he was unemployed. He is an able bodied man, who has held responsible positions. He is well able to support himself.

DEVIATION CASES

[18] There are two situations in which vicarious liability arises. The first is when an employee commits the delict while going about the employer's business. The other is where the wrongdoing takes place outside the course and scope of employment. These are known as "deviation cases". The present case is a typical deviation case.

[19] In *K v Minister of Safety & Security*

[2005] ZACC 8; 2005 (6) SA 419 (CC), O'Reagan J dealt with the common law principles of vicarious liability and its development in the constitutional era. She said that the general principle of vicarious liability under common law holds that an employer is responsible for the wrongs committed by an employee during the course and scope of employment. As long as the employee is acting within the course and scope of his or her duties, or is engaged with the affairs of his or her master, the employer will be liable. She dealt extensively

with a number of judgments in the preconstitutional era, such as *Feldman v Mall* 1945 AD 733 where Watermeyer CJ at 742 captured the test for vicarious liability where an employee had deviated from his normal duties as employee as follows:

"If an unfaithful servant, instead of devoting his time to his master's service, follows a pursuit of his own, a variety of situations may arise having different legal consequences.

- (a) If he abandons his master's work entirely in order to devote his time to his own affairs then his master may or may not, according to the circumstances, be liable for harm which he causes to third parties. If the servant's 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's abandonment of his master's work but by his activities in his own affairs, unconnected to those of his master, then the master will not be responsible.
- (b) If he does not abandon his master's work entirely, but continues partially to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for the harm caused to a third party which may fairly, in a substantial

degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs."

[20] The learned Chief Justice said at 741;

"... a master who does his work by the hand of a servant creates the 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 out his work."

[21] In the same matter, Tindall JA formulated the approach differently. He said the following at 7567;

“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 a matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed.”

[22] In *Minister of Police v Rabie* 1986 (1) SA 117 (A) a mechanic employed by the police force, in plain clothes and not on duty at the time, acting in pursuance of his own interests, wrongfully arrested, assaulted and detained the plaintiff. He had, however, identified himself as a police officer to

the plaintiff, taken him to the police station, filled out a docket and wrongfully charged the plaintiff with housebreaking. On holding the Minister of Police liable, Jansen JA, for the majority of the Court, formulated a test at 134:

“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 made to the servant’s intention. The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant’s acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.”

This test has been followed in many subsequent cases and, as shown later, found favour in the Constitutional Court.

[23] Although there are many variations to these tests, it is clear that that even at common law, it was not always sufficient for an employer to show that the employee had acted in his own interests. The principles of vicarious liability have further evolved under the Constitution, especially in respect of the Police Service. Section 205(3) of the Constitution provides that:

“The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”

The preamble to the South African Police Service Act 68 of 1995 provides as follows:

“whereas ...

AND WHEREAS there is a need to provide a police service throughout the national territory to—

- (a) Ensure the safety and security of all persons and property in the national territory
- (b) Uphold and safeguard the fundamental rights of every person as guaranteed by

Chapter 3 of the Constitution; ..."

[24] In *F v Minister of Safety & Security and Another* 2012 (1) SA 536 (CC) at 540, Mogeng CJ set out the basic premise of the vicarious liability of the Minister of Police as follows:

"[2] In the determination of that question, the State's constitutional obligations to respect, protect and promote the

citizen's right to dignity, and to freedom and security of the person would have to be taken into account. Equally relevant is the State's establishment of a police service for the efficient execution of its constitutional obligations to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

[3] The trust that the public is entitled to repose in the police also has a critical role to play in the determination of the Minister's

vicarious liability in this matter."

[25] The Court approved the test formulated in *Rabie*, supra, and further developed in *K v Minister of Safety & Security* 2005 (SA) 419 (CC). O'Regan J said:

"The approach {in Rabie} 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. The question is whether, even though the acts done have been 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."

[26] Mogoeng CJ said in paragraph [50] in *K* that

"[t]he pivotal enquiry is therefore whether 'there was a close connection between the wrongful conduct of the policemen and the nature of their employment. That is the question that must be asked in determining the State's vicarious liability in this matter.'"

[27] I shall approach this matter by enquiring whether there was a sufficiently close connection between the wrongful act of the second

defendant and the nature of his employment. The further question is whether in this case other members of the SAPS had breached the constitutional duty enjoined upon them by section 205(3) of the Constitution to combat and investigate crime, to maintain public

order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

[28] In this judgment I shall firstly consider whether the Minister is vicariously liable for the wrongful act of the first defendant and secondly whether the Minister is vicariously liable for omissions of other members of the Police Service in failing to

protect and secure the safety of the deceased.

APPLICATION OF THE LAW TO THE FACTS

[29] An important consideration in this matter, as was the case in Rabie and Feldman is the risk that the State bears when it employs a police officer. The risk is magnified when the State issues a police officer with a firearm, which he is allowed to carry with him at all times, even when off duty. In this case the situation was further aggravated by the fact that the first defendant had proven himself to be a volatile character who had repeatedly threatened to kill the deceased. The Makhado Station Commander regarded the threats so seriously that she confiscated the first defendant's firearm. For reasons unknown the firearm was in due course returned to the first defendant.

[30] It was the first defendant's task in terms of section 205(3) of the Constitution to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. Instead of protecting the deceased, the defendant deliberately killed her.

[31] The pivotal question, as per Mogoeng CJ in *K* remains, however, whether there was a sufficiently close connection between the wrongful

conduct of the policemen and the nature of their employment. In my view there was. The deed was perpetrated on police premises by a policeman with his service firearm. He was admittedly not performing his duties at the time, but the connection between the nature of the first defendant's employment and his wrongful act was as close, if not closer than that of the policemen in *Rabie*, *K* and *F*.

[32] Moreover, it is not only the wrongful act of the first defendant that is under scrutiny. The lack of diligence on the part of other members of the SAPS must also be considered. The police officers at Vleifontein satellite police station did not take the first plaintiff seriously enough and did not provide the protection she required. Only halfhearted efforts, if any, were made to find the first defendant during the night before the murder. According to Warrant Officer Rambau, police officers from Makhado Police Station went to the first defendant's home only once during the night. If they were serious about securing the safety of the deceased, they would have staked out the house for the whole night. Rambau would also have tried to contact the first defendant on his cell phone.

CONCLUSION

[33] I find that there was a sufficiently close connection between the acts of the first defendant and the nature of his employment to hold the Minister of Police vicariously liable for the damages suffered by the first plaintiff and the minors on whose behalf she instituted action.

[34] I also find that the Minister is vicariously liable for the lack of diligence of other police officers in failing to protect the deceased.

In the result I make the following order:

The first and the second defendants are liable for whatever damages the first plaintiff may prove that she and the two minor children, O... J.... M.... and P... J.... M....., have suffered.

2. The question of the quantum of damages is postponed sine die.
3. The first and second defendants are ordered to pay the first plaintiff's costs.
4. The second plaintiff's claim is dismissed with costs.

J. HIEMSTRA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Date heard: 23 October 2013

Date of judgment: 4 December 2013

Counsel for the plaintiffs: Adv C.D. De Klerk

Attorney for the plaintiffs: S.O. Ravele Attorneys

Counsel for the first defendant: Adv F.E. Monandi

Attorney for the first defendant: TL Baloyi Attorneys

Counsel for the second defendant: Adv. A.M. Jozana

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