

SOUTH AFRICA / JUDGMENT

Theron and Others v Minister of Police and Others (1082/2016) [2020] ZALMPPHC 26 (20 May 2020)

[2020] ZALMPPHC 26

COURT

Limpopo High Court, Polokwane

BEFORE

Makgoba

CASE / FILE NUMBER

1082/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

CASE

NO: 1082/2016

20/5/2020

In

the matter between:

WILLEM
ADRIAAN THERON
FIRST PLAINTIFF
ANNA
MARIA MARGARETHA THERON
SECOND PLAINTIFF
CATHARINA
CORNELIA STOCKHUSEN NO
THIRD PLAINTIFF
CATHARINA
CORNELIA STOCKHUSEN NO
FOURTH PLAINTIFF
and
MINISTER
OF POLICE
FIRST
DEFENDANT
NATIONAL
COMMISSIONER OF POLICE
SECOND DEFENDANT
PROVINCIAL
COMMISSIONER OF POLICE
THIRD DEFENDANT

JUDGMENT

MAKGOBA JP

- [1] The Plaintiffs in this matter instituted action against the Defendants claiming damages arising out of the death of one JJ Theron on the 27 April 2015 in Polokwane. The First and Second Plaintiffs are the parents of JJ Theron ("the deceased"). The Third and Fourth Plaintiffs are one and the same person, namely, the divorcee wife of the deceased. She instituted the claim for loss of support in her capacity as mother and natural guardian of the deceased's two minor children, Migael Andriaan Theron born 12 July 2007, and Carissa Theron born on 8 July 2010.
- [2] The deceased was the father of the two minor children in question and that as at the date of the death of the deceased, there was an existing maintenance Court order in favour of the mother of the minor children for their maintenance. The mother of the minor children and the deceased divorced in August 2012.
- [3] A separation of issues has been ordered in terms Rule 33(4) of the Uniform Rules of Court. The determination of quantum of damages has been postponed sine die, and this matter proceeded on trial on the aspect of liability or merits only.

FACTUAL

BACKGROUND

Plaintiffs' Evidence

[4] The evidence of the Plaintiffs was led through five witnesses, namely the Second Plaintiff, a member of the neighbourhood watch (Mr Hartman) and three medical practitioners.

4.1. Anna Maria Theron is the mother of the deceased. After his divorce the deceased stayed with his mother and father at their house at 18 Meteor Street, Bendor, Polokwane. During the weekend preceding the 27th April 2015 the deceased's two minor children visited their grandparents house where their father lived.

4.2. Mrs Theron testified that in the early hours of the morning of the 27th April 2015 at 03h30 the deceased's daughter (Carissa) requested to go and sleep in her father's room and this was granted. Between 06h00 and 8h00 she observed that the deceased was sitting in the TV room with his daughter and at 08h30 it appeared that the deceased was back in his bedroom with his daughter. It is during this time that the parents of the deceased were concerned as they made an observation that there were acts of violence by their son as he was breaking glass objects behind closed doors in the presence of his daughter. Carissa at that time reported to her grandparents that she was hiding under the mattress in the room. The grandparents at that time, concerned about the well-being of the granddaughter, attempted to break through the door into the room when the grandfather was bitten by the deceased on both of the arms. That is when the deceased's father decided to call the Police and the neighbourhood watch for assistance.

4.3. According to Mrs Theron, the deceased was known to have been using drugs. During that morning she realized that the deceased's bedroom was mixed up and that the deceased started behaving in a strange manner. The deceased uttered strange words to the following effect: "Mama, help me! I cannot take it anymore! There is a snake in the room. I want to climb the highest mountain!"

4.4. A tenant of the Therons, Mr Andries Jordaan was asked to call the Police and two members of SAPS, a male and female arrived at Theron's house. The two policemen could not succeed in opening the door to the deceased's bedroom. They called for a backup and thereafter six more policemen came to the scene. Two members of the neighboured watch, namely Mr Casper Van der Spuy and Mr Peet Hartman also came. The Police together with the two members of the neighbourhood watch succeeded in breaking the door and entered the deceased's bedroom.

4.5. At some stage Mr Van der Spuy managed to take the child from the deceased but the deceased took the child back. The deceased was sprayed with a pepper spray and was then subdued. The Police

managed to take the child away from the deceased and handed the child to her. At that stage she saw the deceased lying on his side on the floor. After taking the child to her bedroom she went back to the deceased's bedroom and saw the deceased lying on his stomach and handcuffed. Mr Van der Spuy brought a rope which was used to tie the deceased's legs. At that stage it appeared to her that the deceased was unconscious. A belt was also used to fasten the deceased's legs. She

observed that the deceased was blue on his right side of the face and had goose bumps on both legs. The deceased was lying on his stomach, with his legs fastened and his hands still handcuffed. She later realised that the deceased had passed on.

4.6. Mr Peet Hartman, a member of the neighbourhood watch also testified. He arrived at scene and was later followed by Mr Van Der Spuy. The Police arrived a few minutes thereafter. He learnt from Mrs Theron

that her son had locked himself together with his daughter in the bedroom. He realized that the bedroom was in a mess and that the girl child was below the bed. With the help of the Police they succeeded in taking the child from the deceased but the deceased managed to take the child back. After the deceased was pepper sprayed and subdued, he succeeded in taking the child away from the deceased and handed her to Mrs Theron.

4.7. Mr Hartman confirmed that the deceased was tied with a rope and a belt. When asked whether he saw anybody strangling the deceased, his answer was no. He further stated that he himself never strangled the deceased and further that Mr Van der Spuy also did not strangle the deceased.

4.8. The next witness for the Plaintiffs was Dr M M Matlala. She is a medical practitioner with a further qualification of a Diploma in Pathology. She is the medical doctor who performed the post-mortem in respect of the deceased on the 30th April 2015. Her chief post-mortem findings which as a result, made a conclusion with regard to the cause of death are as follows:

1. Multiple abrasions and bruises on the face; abrasions on the body.
2. Contusions of the facial and neck muscles.
3. Fractured hyoid bone.
4. Signs of asphyxia.

4.9. Dr Matlala declared on the basis of findings from the medico-legal post-mortem examination that the manner of death was due to unnatural causes. The cause of death statement on the form DHA-1663 was formulated as Asphyxia due to manual strangulation. She described the Asphyxia as being the mechanism that follows compression of the neck and this compression has brought about the underlying / primary cause of death, being manual strangulation. Dr Matlala did not list any contributory factors that might have contributed to the immediate cause of death. The post-mortem examination report was handed in as "Exhibit A" and the addendum thereto was handed in as "Exhibit B".

Dr T A Mamashela was the next witness to testify. He is a registered specialist in Forensic Pathology and is also engaged in the practice of Forensic Pathology as a consultant. His report was read into record and handed in as "Exhibit C". Dr Mamashela endorsed the findings of Dr Matlala that the cause of death of the deceased was as a result of Asphyxia due to neck compression with manual strangulation. He further stated that the findings made by Dr Matlala

are indicative of force applied to the neck as a result of manual strangulation that resulted in Asphyxia. The main conclusions and / or opinion arrived at by Dr Mamashela are the following and are noted verbatim:

"[1] The history and circumstances surrounding the death of Mr Theron JJ from the documents I was supplied with and perused describes an individual who was during the moments prior to his death violent and as a result his safety and that of the others was a concern for his parents.

As a result the parents of Mr Theron JJ were compelled to seek assistance from the law enforcement personnel to deal with the issues of safety especially with the issues of safety of the child who was in the same room as Mr Theron JJ.

[2] It is clear from the records that the cause or factors leading to the aggressive and violent behaviour of Mr Theron JJ could not be explained or ascertained. However, it remains a matter of speculation with regard to the possible effects of drugs and this is on the basis of the history of drug use by Mr Theron that is contained in the stated affidavit by his parents.

The post-mortem examination report by Dr M M Mat/ala indicated that a blood sample was collected for analysis of alcohol levels and drug screen. The results of the analysis are not part of the documents supplied and perused. Furthermore it is not clear if the tests have been conducted or the results are available.

The blood results could assist in making the assessment if Mr Theron JJ was acting under the influence or the effect of any form of substance or not.

[3] Mr Theron JJ was restrained by law enforcement officials. The post- mortem examination report indicates that there was a significant amount of force applied to Mr Theron JJ during the restrain. It is further clear that the method applied during the process of restrain were fatal in nature and incompatible with the life rather than calming down a violent and aggressive individual.

[4] The cause of death of Mr Theron JJ as determined from the post- mortem examination by Dr M M Matlala can be linked directly with the application of force during the process of applying restraint in an attempt to deal with violence and aggression by Mr JJ Theron."

[5] It is appropriate even at this early stage of my judgment to note and comment on the significance of the reports of both Dr Matlala and Dr Mamashela with regard to the cause of death of the deceased. Both doctors agree that the cause of death was the application of force on the neck or on the throat of the deceased which led to Asphyxia, that is loss of breathing, due to manual strangulation. This entails that one or more persons could have handled or grabbed the deceased on the neck or throat and pressed it so hard that such force could ultimately have led to Asphyxia. It is against this background that at the closure of the Plaintiffs' case I dismissed the Defendant's application for absolution from the instance and called upon the Defendants to lead their evidence in rebuttal of the prima facie version of the Plaintiffs.

[6] It is common cause that indeed the deceased on the day in question was violent and apparently under the influence of drugs and thus needed to be subdued. The question is what method of subjugation could have been used to subdue the deceased. On this aspect the Plaintiffs called an expert witness in the person of Professor / Doctor Gian Lippi, a Forensic Psychiatrist at the University of Pretoria.

[7] Professor Lippi testified and described the accepted method and practice utilised in the management of aggressive persons and how to restrain and calm down such persons. The following are such measures to be taken:

7.1. Attempt to de-escalate the situation by calmly conversing with the patient in a non-aggressive tone or manner with the aim of calming him or her down.

7.2. If all attempts by an individual to calm the patient down using dialogue have failed, it is advised that a number of security and / or preferably male medical staff be gathered to stand behind the Health Care Practitioners attempting to de-escalate the situation in a "show of force", but not to get involved in dialogue.

7.3. If all attempts to calm the patient down using dialogue have failed, and it is the opinion of the Health Care Practitioner that the patient requires physical restraint to ensure his / her safety and that of others, the following procedure is advised:

- (1) Six, preferably male staff members should gather to discuss how they are going to restrain the patient - every individual should know their role before any restraint is attempted;
- (2) One staff member each is allocated to hold the head, left arm, right arm, left leg and right leg of the patient;
- (3) The patient should then, as gently as possible, be brought to the floor face down;
- (4) Each limb should be held against the floor, the head should be turned to the side and held against the floor as gently as possible;
- (5) No force should be applied to the patient's back and no hands should be applied around the patient's neck;
- (6) The patient is held down until he / she no longer struggles or until he / she verbally agrees to cease his/ her aggression.
- (7) If deemed necessary, the patient can then be temporarily placed in a seclusion room for his / her safety and that of others.
- (8) If the patient is secluded it is the responsibility of the treating staff to make sure that he or she is regularly observed for his own safety;
- (9) The use of physical restraints like tying a patient up or down is the last resort.

- [8] Professor/ Doctor Lippi gave an opinion that the South African Police Service may have their own policy of how to restrain aggressive persons. However, from a medical point of view, and related to the restraint of the deceased in the present case, Dr Lippi is of the opinion that tying the deceased up using a rope and belt is deemed to have been unnecessary if there had been enough people who could have held his limbs as described above.

Defendants' Evidence

- [9] Four witnesses testified on behalf of the Defendants - three police officers present at the scene of the deceased's death and an expert witness who testified on the possible cause of the deceased's death.

9.1. Captain Daniel Selepe, a member of the South African Police Service testified that he attended the scene at 18 Meteor Street, Bender, Polokwane on the 27 April 2015 after being called by Warrant Officer Nyandeni who needed police backup. At the scene he found other police officers, namely Nyandeni, Machaka, Mogano and Lekota. Also there were two members of the neighbourhood watch and the deceased's parents. According to Captain Selepe the members of the neighbourhood watch were inside the house trying to put the deceased under control. He was later told by Mr Hartman that the deceased was no longer aggressive or violent. He then called the Emergency Medical Services (EMS) personnel who then came to the scene. One Mr Jacobs of the EMS examined the deceased and certified him dead.

9.2. Under cross-examination Captain Selepe stated that he was not involved in any effort to subdue the deceased. However, he stated that he saw one of the police officers trying to handcuff the deceased and that the deceased was violent and resisting.

9.3. Sergeant James Magano of SAPS testified that he arrived at the scene on 27 April 2015 and found the police officers, Nyandeni and Machaka there. He got a report from Mr Theron (deceased father) that the deceased was inside the house holding his grandchild captive and that the deceased was aggressive and under the influence of drugs. He and other police officers proceeded to the house and he heard the child screaming in the house. They decided to go and rescue the child. He heard the deceased shouting:

"I am killing my own child"

He and Nyandeni managed to get into the room. The deceased held the child and a mattress was on top of them. He used a blanket to cover the deceased and in the process Nyandeni removed the child and gave the child to the deceased's father who was nearby.

9.4. The deceased managed to stand up and ran out of the room. He broke the window pane and attacked Sgt Mogano. The latter managed to run out of the room. The deceased's father had dropped the child at the passage whereafter the deceased grabbed the child and proceeded to another room with the child. The police officers had no option but to follow the deceased in an effort to rescue the child. According to Magano they were 10 men in number, being 7 policemen, 2 neighbourhood watch members and the deceased's father inside the house.

The policemen entered the room and found the deceased holding the child between his thighs - the child was in pain. According to Mogano all of them (the policemen) took part in a struggle to free the child. After removing the child the deceased was handcuffed. There was a heavy struggle to bring the deceased under control and eventually to handcuff him.

According to Sgt Mogano he never grabbed the deceased by his throat during the struggle and he did not notice any of the policemen grabbing the deceased by his throat or neck.

9.5. Under cross-examination Sgt Mogano stated that 10 SAPS members had entered the room in order to overpower the deceased and free the child. He stated further that the struggle to overpower the deceased and free the child from the second room ensued for about 10 to 15 minutes. Sgt Mogano could not dispute the post-mortem report findings that the deceased was strangled.

9.6. Warrant Officer Ben Nyandeni is also one of the Police Officers who took part in the struggle to subdue the deceased in an effort to free the child. He got information that the deceased was violent, breaking house property and had kept the child captive inside the house. He was told that the deceased was under the influence of drugs.

He and Magano managed to free the child from the deceased on the first occasion and handed the child to Mr Theron Senior. The deceased managed to take the child back and went into the second room with the child. According to Nyandeni, four of them (police only) followed the deceased into the second room. The child was removed from the deceased and handed over to Mr Theron Senior.

9.7. Warrant Officer Nyandeni testified further that after the child was removed from the deceased he himself asked for a belt to tighten the deceased. He cannot remember who handcuffed the deceased. According to him no one held the deceased by the neck during the struggle to subdue the deceased.

9.8. Under cross-examination Nyandeni stated that there were only four policemen who entered the second room and got involved in the struggle with the deceased. The neighbourhood watch members were, according to him, outside. Only four policemen took part in an effort to subdue the deceased. He contradicted the evidence of Sgt Magano that 10 men took part in the struggle to subdue the deceased in that second room.

He stated further that after the child was rescued it took them 15 to 20 minutes to try and subdue the deceased.

9.9. The expert witness called by Defendants is Dr S P Jansen Van Vuuren, a medical practitioner registered as a specialist in Forensic

Pathology. Dr Jansen Van Vuuren testified and confirmed that a medico-legal post-mortem examination was performed by Dr M M Matlala on the deceased on the 30th April 2015. He confirmed and agreed that the cause of death was found to be "Asphyxia Due To Neck Compression Consistent with

Strangulation". He also confirmed that there was a fracture of the hyoid bone and also signs of Asphyxia. According to Dr Jansen Van Vuuren in his opinion and after perusal of the post mortem report and with the available information the pathologist had at the time of the post mortem examination, he would concur with the conclusion of the cause of death as found by the pathologist. He stated further that it is important to note in the cause of death that the mechanism of injury which caused the Asphyxia and neck compression was noted as "Consistent with" manual strangulation in the report. In his opinion this indicates a probability of manual strangulation which is more likely than not, but does not exclude other possibilities of neck compression or injury.

9.10. He testified further that the general mechanism of injury, relating to the cause of death, was blunt force trauma to the neck. The blunt force injuries to the neck shows a pattern of the following injuries:

- (1) The fracture of the hyoid bone (and related injuries) was caused by blunt force trauma to this area. The presence of a fractured hyoid bone, in association with an Asphyxia death, is associated with throttling or manual strangulation.
- (2) A "discoid abrasion" was noted on the ankle of the left jaw, anatomically related to underlying blunt force injuries to the neck tissues, including the hyoid bone fracture. The pattern of this injury is suggestive of a mechanism of injury by a fingertip, and as such manual compressing of the neck tissues at this area.

9.11. This witness was of the view that the possibility that "excessive force" was used in subduing the deceased is a legal question. That it is not possible, using evidence based on medicine, to determine the specific amount of pressure used or the specific

duration of pressure. Of interest, Dr Jansen Van Vuuren quotes the opinion by Drs Real and Eisele, writers in the medical field, where they said "Use of neck holds (by police officers) must be viewed in the same way as firearms; the potential for a fatal outcome is present each time a neck hold is applied and each time a firearm is drawn from its holster".

9.12. The joint minutes of Dr Van Vuuren and Dr Mamashela was handed in during the trial as Exhibit D. There are many points of agreement between them, in particular on the following point: "Given the injuries sustained by Mr J J Theron during the restraining process and the eventual cause of death found during the medico-legal post-mortem examination, it is apparent that the method of restraint was fatal"

(Their underlining)

In conclusion Dr Jansen Van Vuuren opines that:

The medical evidence shows that fatal force was used in subduing Mr J J Theron (deceased). However, the amount and duration of force used to subdue Mr J J Theron cannot be determined accurately. The contribution of drug intoxication to the underlying cardio-vascular

vulnerability and the amount of force that was used, should be considered due to the effects that these drugs have on the cardio-vascular system. This will have implications in terms of the foreseeability of the fatal outcome of the actions by the police.

ISSUES

[10] The following issues are to be determined in the light of the above stated factual background:

10.1. Whether the police officers of the Defendants ("members of SAPS") owed a legal duty of care to the deceased and the Plaintiffs under the circumstances;

10.2. Whether the members of SAPS acted in breach of such a duty and did so negligently and

10.3. Whether there was a causal connection between such negligent breach of the duty and the damage suffered by the Plaintiffs.

This then leaves the way open to consider the delictual liability of the Defendants.

DELICTUAL LIABILITY OF THE DEFENDANTS

[11] It is the Plaintiffs' case that the Defendants have a statutory legal duty in terms of section 205 of the Constitution to assist and protect the public and that on 27 April 2015 members of the SAPS were called in their official capacity to assist the Plaintiffs in handling a volatile situation at the Plaintiffs' home. In the process the members of SAPS, as employees of the Defendants breached their legal duty, more particularly failed to establish proper control over the

scene or at all. That the inability of members of SAPS as law enforcement officers to manage the scene of the crime or incident was the direct cause of the death of the deceased.

[12] Furthermore the Plaintiffs contend that the police officers of the Defendants acted wrongfully and negligently in that they, as law enforcement officers caused or contributed to the death of the deceased, alternatively, wrongfully and negligently allowed members of the neighbourhood watch to cause or contribute to the death of the deceased and in these circumstances, it is actually irrelevant who in particular caused the death of the deceased.

[13] It is trite that a delictual claim for damages should have all the elements of a delict namely: an act (actus reus) that is unlawful or wrongful, that was performed negligently (fault, in particular culpa) and that was the cause of the harm incurred[1].

[14] The crux of this case is whether the members of SAPS managed the psychotic episode of the deceased correctly with the least amount of force; and whether there were other less invasive options that could have been followed to restrain the deceased during his psychotic episodes taking into consideration the existing circumstances.

The Act (actus reus)

[15] The undisputed medical evidence on record is that the cause of death was Asphyxia as a result of manual strangulation and that considerable

force was applied and maintained to the neck area of the deceased to cause the hyoid bone to fracture. Furthermore and according to the evidence of Dr Van Vuuren (the Defendant's expert witness) the mechanism of the injuries to the deceased indicated a probability of manual strangulation which is more likely than not but does not exclude other possibilities of neck compression or injury. Dr Van Vuuren confirmed the presence of a fractured hyoid bone, in association with an Asphyxia death and that this pattern of the injury is suggestive of a mechanism of injury by a fingertip, and as such manual compressing of the neck tissue at this area.

[16] The above stated medical evidence constitutes prima facie evidence that the deceased was throttled during the struggle with members of SAPS. The latter had a lot to explain as to how the deceased could have sustained such injuries during their struggle with him for a considerable period of more than ten minutes as stated by Sgt Magano and Warrant Officer Nyandeni. The police officers failed to adduce evidence to rebut the prima facie medical evidence. They denied that any of the police officers held the deceased by his neck area. I find it improbable that during a struggle between the deceased and more than four police officers for a considerable period of more than ten minutes, none of them could not have held the deceased by his neck area. In the circumstances of this case I am enjoined to draw an inference that one or more of the police officers held the deceased by neck area and thus throttled him. This is the only inference which is sought to be drawn in the circumstances[2].

[17] It does not make any difference whether the neighbourhood watch members could also have throttled the deceased as Counsel for the Defendants argued. The neighbourhood watch members were in joint operation with the members of SAPS and would be jointly liable with the members of SAPS. The latter were in charge of the situation at the scene and had a duty to monitor the conduct of any person at the scene including members of the neighbourhood watch.

[18] In the circumstances I make a finding that one or more of the members of SAPS involved in the struggle with the deceased did in fact throttle the deceased. Accordingly, their conduct was the cause of the neck injuries sustained by the deceased.

Wrongfulness / Unlawfulness

[19] Wrongfulness is also an essential and discrete element which has to be established for delictual liability to ensue. The objects of the police service are stated in section 205(3) of the Constitution as: "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". Accordingly, in the present case the members of SAPS and the Defendants owed a legal duty of care to the deceased and the Plaintiffs. Breach of such legal duty gives rise to delictual liability.

[20] The Plaintiffs contended, correctly so in my view, that the Defendants owed a legal duty to the deceased and the Plaintiffs to ensure their safety and security and had a legal duty to uphold and safeguard the fundamental rights in terms of the Constitution which include the right to life, the right to respect for and protection of dignity and the right to freedom and security. In the circumstances, the Defendants ought reasonably and practically to have prevented harm to the deceased and the Plaintiffs. In other words, it is reasonable to expect of the Defendants to have taken positive measures to prevent harm from ensuing. In the present case evidence presented by the medical experts on behalf of the Plaintiffs shows clearly that the unfortunate death of the deceased could have been avoided or prevented had members of SAPS not used or allowed to be used excessive and deadly force. There is no justification found from the evidence led that the members of SAPS took steps to prevent the fatal accident or at all, or that their lives were at the time endangered.

[21] The element of wrongfulness or unlawfulness addresses the reasonable objective test of whether the wrongdoer acted in accordance with what is expected by the boni mores and the reality of what actually occurred. The evidence for the Defendants in the present case basically amounted to bare denials.

The members of SAPS denied that they had touched the neck area of the deceased. Consequently they do not raise any ground of justification

in the death of the deceased nor do they give any explanation of a minimum force they could have used to subdue the deceased.

[22] In constantly denying that they have touched the deceased's neck area (which is obviously false in view of the experts' evidence including that of the Defendants' own expert) they failed to put any evidence before this Court to consider in making a finding as to the reasonableness of their actions. I accordingly make a finding that the conduct of the members of SAPS and their manner of restraining or subduing the deceased was wrongful. The members of SAPS used excessive force in the circumstances to restrain and subdue the deceased and therefor their conduct is unlawful.

See *Govender v Minister of Safety and Security*[3].

[23] There was no reason to deliberately render the deceased unconscious solely to apply restraining measures if there were enough persons (in this case 8 policemen plus 2 neighbourhood watch members) available to hold his arms and legs. In addition, once the restraints are in place, there is no further reason to apply force to the neck which, in this case, led to death through Asphyxia. Excessive force was applied to that part of the body (neck) without justification and this resulted in the death of the deceased.

Negligence

[24] The question is whether the actions of the relevant members of SAPS during the restraint of the deceased fell below the standard

reasonably expected of them. Put differently, the legal issue to be adjudicated upon is whether the restraint was conducted negligently.

[25] The test for negligence was set out by Holmes JA in *Kruger v Coetzee*[4] as follows:

"For the purposes 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."

See also *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd*[5] and *Minister of Safety and Security v Van Duivenbonden*[6].

The onus is thus on the Plaintiffs to establish that the death of the deceased on the 27 April 2015 was as a result of the negligent conduct of the members of South African Police Service.

[26] In *Mashongwa v Passenger Rail Agency of South Africa*[7] the Constitutional Court pointed out that "the standard of a reasonable person was developed in the context of private persons" and, given the fundamental difference between the State and individuals, "it does not follow that what is seen to be reasonable from an individual's point of view must also be reasonable in the context of Organs of State". The standard to be applied is not that of a reasonable person, but that of a reasonable Organ of State, that is members of SAPS in the present case.

[27] A reasonable Organ of State is expected to "take reasonable measures to advance the realisation of the rights in the Bill of

Rights" and the availability of resources is an important factor in determining what steps were available to the Organ of State and whether reasonable steps were in fact taken. It is therefore necessary for the Organ of State "to present information to the Court to enable it to assess the reasonableness of the steps taken"[8]

[28] In the present case there is no explanation or information proffered by the members of SAPS responsible for the restraining of the deceased as to how it came about that the deceased was throttled to a point of death as shown by the medical evidence. Their evidence basically amounted to bare denials that they touched the neck area of the deceased. On the other hand, it is clear from the evidence that none of the neighbourhood watch members were actively involved in the actions of restraining the deceased. There is sufficient evidence that after the daughter had been taken away from the deceased, the police officers kept on struggling to subdue the deceased for a considerable period of time.

- [29] It was testified that in the first bedroom where the police officers encountered the deceased and his daughter, only two police officers successfully managed to restrain the deceased by using a blanket to cover the deceased whilst taking the child away from him. They could not explain to this Court as to why the same method could not have been used successfully for the second time when the deceased went into the second bedroom. In the second bedroom there were even more police officers (not less than four) present which number should have made the restraining process of the deceased much more easier.
- [30] Prof / Dr Lippi testified about the way a violent person should be restrained. He was adamant that the neck area of any person who is to be restrained is a "no go" area as with proper planning, which should only take few seconds, it should not have been necessary to target the neck area of the deceased at all. This evidence is not gainsaid by the Defendants. Should the Defendants' witnesses have testified that a neck hold or strangulation was indeed necessary as the only option to subdue or restrain the deceased, this Court could have considered the reasonableness of them using such deadly force. Instead, the police officers persisted with their false bare denial that any of them had touched the neck area of the deceased. In my view, and based on the evidence presented by the medical experts of the Plaintiff (even the Defendants' expert to a certain extent) the unfortunate death could have been prevented had the Defendants' officers not used excessive force.
- [31] I make a finding that the members of SAPS at the scene on the day in question were negligent in handling the situation. They had a clear duty to take control of the scene to ensure that reasonable action was taken and not deadly force. At all material times they were aware or should have been aware of the fact that excessive force may fatally harm the deceased. On their own version they had at least six trained officers at the scene. They could have restrained the deceased sufficiently to wait for the effect of drugs to normalise or to call for assistance from a medical practitioner.

Causation

- [32] The element of causation consists of factual causation and legal causation. The former is based on the relevant facts whether there is a break in the chain of events that caused the harm. Legal causation on the other hand determines whether damage that occurred is too remote to reasonably be imputed to the defendant.
- [33] What remains to be considered in this matter is whether the wrongful and negligent conduct of the members of SAPS was the legal cause of the death of the deceased. It was held in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) that 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.

[34] In the present case a test is required to determine whether the police conduct was the legal cause of the Plaintiffs' harm arising from the death of the deceased. It entails an enquiry into whether the wrongful act is sufficiently closely linked to the harm for legal liability to ensue.

[35] It is common cause that the cause of death in the present case is "Asphyxia due to Neck Compression consistent with Manual

Strangulation". A renowned writer in the medical field, Professor Antomos G. Angoules[9] opines that: "Hyoid bone fracture following strangulation or hanging is well documented and that in a suspected case of murder, a fractured hyoid bone is indicative of strangulation. Non - strangulation related fractures are rare. Traumatic hyoid bone fractures are potentially life threatening injuries".

[36] In the light of the factual and medical evidence before me, I am of the view that the element of causation is established. The lack of mechanism of control, lack of pro-active systems and inadequate management of the officials (personnel) under the Defendants'

supervision, caused the members of SAPS to use excessive force that resulted in the death of the deceased.

PLAINTIFFS' CLAIMS FOR GENERAL DAMAGES

[37] The First and Second Plaintiffs claims in terms of the Particulars of Claim is for general damages for emotional shock, emotional suffering and sentimental damages. They allege that they have suffered emotional trauma and shock as a result of the death of their son, (the deceased) in the hands of members of SAPS and in their presence.

[38] In *Barnard v Santam*[10], the Supreme Court of Appeal confirmed the existence of a remedy where a plaintiff sustained nervous shock as a result of the death of a relative. The test for liability is far more dependent upon the relationship between the claimant and the victim.

The same approach was followed by the same Court in *Road Accident Fund v Sauls*[11]. In that matter a plaintiff witnessed her fiancé being struck by a motor vehicle in her near vicinity. She thought he had been killed or seriously injured (fortunately neither was the case) and was left in a condition of shock and confusion. She was subsequently diagnosed with post-traumatic stress disorder which became chronic and unlikely to improve. As was summed up in Court, "her case is that as a consequence of her witnessing the injury to her fiancé she suffered severe emotional shock and trauma which gave rise to a recognised and detectable psychiatric injury.....".

In holding the defendant liable, Olivier JA explained[12]

"It must be accepted that in order to be successful a plaintiff in the respondent's position must prove, not mere nervous shock or trauma, but that she or he had sustained a detectable psychiatric injury. That this must be so is, in my view, a necessary and reasonable limitation to a plaintiff's claim can find no general, "public policy" limitation to the claim of a plaintiff, other than a correct and careful application of the well-known requirements of delictual liability and of the onus of proof "

- [39] Another judgment of the SCA in *Mbhele v MEC for Health for the Gauteng Province*¹[13] went further to recognise the claim for emotional shock. In that matter, due to negligence on the part of certain hospital authorities, the appellant's child was stillborn. She instituted action for damages in the High Court. The SCA found, on appeal, that the High Court had erred in finding that the appellant's claim for emotional shock had been abandoned and proceeded to consider whether it had been proved. It was held that it had, and awarded the appellant R 100 000 as damages, saying that there could be no doubt "that the appellant experienced shock, grief and depression".
- [40] The existence of a remedy where a plaintiff has suffered emotional shock or trauma has now been confirmed and settled in the more recent Supreme Court of Appeal judgment in the case, *R Kand Others v Minister of Basic Education and Others*[14]. This is the infamous case relating to the Komape child who fell into a pit toilet at his school in Limpopo and died. His parents and siblings were all awarded damages for emotional shock, trauma and grief that had been suffered.
- [41] Based on the authorities referred to and discussed above, I accordingly find that the parents of the deceased (J J Theron) and the deceased's two minor children have suffered damages for emotional shock, trauma and grief as a result of the death of the deceased, J J Theron.

CLAIM FOR LOSS OF SUPPORT

- [42] The Third and Fourth Plaintiffs, as mother and natural guardian of the two minor children of the deceased claim damages for loss of support on behalf of the two children. Counsel for the Defendants, Mr Mphahlele SC argued that the Third and Fourth Plaintiffs have no locus standi to institute action on behalf of the two minor children. He contended that a marriage relationship with the deceased has not been proved and consequently a duty of support in relation to the two minor children has not been established. For reasons that follow hereunder, there is no merit in the argument raised by Counsel. The points raised by Counsel are overly technical in nature.
- [43] In paragraph 3 of the Particulars of Claim it is alleged that the Third Plaintiff is acting in her capacity as mother and natural guardian of the child, Migael Theron. Furthermore in paragraph 4 of the Particulars of Claim it is alleged that the Fourth Plaintiff is acting in her capacity as mother and natural guardian of the child, Carissa Theron. The Defendants admitted these allegations in paragraph 1 of their Plea.

[44] The Second Plaintiff (Anna Maria Theron) in her evidence-in-chief at the trial testified that the deceased was the father of the two minor children in question and that there was an existing maintenance Court order in favour of the mother of the children, being the Third and Fourth Plaintiffs, for the maintenance of the children. That the mother of the children and the deceased divorced in August 2012. This evidence was not disputed in cross-examination by the Defendants' Counsel. The Defendants also did not object to the evidence of Mrs Theron (mother of the deceased) as not being best evidence on the averments by Mrs Theron. In my view, the averments by Mrs Theron were therefore placed out of dispute by the Defendants.

[45] It is unfair and opportunistic for Counsel to raise the point of locus standi only during the closing argument when he did not challenge the Plaintiffs' evidence during trial, in particular in cross-examination. In *President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC)* para 61 it was stated:

"The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts."

It was further held para 63:

"The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to

be challenged. This is so because the witness must be given an opportunity to deny the challenge. to call corroborative evidence. to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed." (My underlining).

CONCLUSION

[46] In consideration of all the evidence on record, it is my considered view that the Plaintiffs have proved their case on a balance of probabilities that members of SAPS, and consequently the Defendants are delictually liable for the death of the deceased, J J Theron.

[47] In the result I grant the following order:

- (a) It is declared that the Defendants are liable, jointly and severally, to compensate the First and Second Plaintiffs in such sum as may be agreed or determined in due course.
- (b) It is declared that the Defendants are liable jointly and severally, to compensate the Third and Fourth Plaintiffs in their capacity as mother and natural guardian of the two minor children in such sum as may be agreed or determined in due course.
- (c) The Defendants are liable, jointly and severally, for payment of the Plaintiffs' costs including the qualifying expenses and attendances of the three expert witnesses, Dr Matlala, Dr Mamashela and Prof / Dr Lippi.

EM MAKGOBA

JUDGE PRESIDENT OF THE

HIGH COURT, LIMPOPO

DIVISION, POLOKWANE

APPEARANCES

Heard on

: 6 May 2019, 1-2 July 2019, 24 July 2019,

3 October 2019, 5 December 2019,

20 March 2020, 8 May 2020.

Judgment

delivered on : 21 May 2020

For the Plaintiffs

: Adv. I A Van den Ende

Instructed by

: Nelis Britz Attorneys

For the Defendants

: Adv. MS Mphahlele SC

Instructed

: State Attorney

Polokwane

[1] Neethling JP, Potgieter JM and Visser PJ: The Law of Delict (2010) p34ff .

- [2] R v Blom 1939 AD 188 at 2020 - 203; Zeffert et al: The South African Law of Evidence (Lexis Nexis) pages 95 - 96
- [3] 2001 (4) SA 273 (SCA)
- [4] 1966 (2) SA 428 (A) at 430
- [5] 2000 (1) SA 827 (SCA)
- [6] 2002 (6) SA 431 (SCA)
- [7]
- [2015] ZACC 36, 2016 (3) SA 528 (CC) at para 40
- [8] Mashongwa at para 41
- [9] Faculty of Healthcare Professions at the Technological Educational Institute of Athens, Greece.
- [10] Barnard v Sant am [1998] ZASCA 84; 1999 (1) SA 202 (SCA)
- [11] Road Accident Fund v Saul s 2002 (2) SA 55 (SCA)
- [12] Road Accident Fund v Sauls paras 13 and 17
- [13] Mbhele v MEC for Health for the Gauteng Province (355 /15) [2016] ZASCA 166
- [14] R K and Others v Minister of Basic Education and Others (754/ 2018 and 1051/2018 [2019] ZASCA 192 (18 December 2019) at paras [32],
- [48] and [56].

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Prepared on 10 October 2026 · Esheria