



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

CASE NUMBER: A165/2021

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO

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SIGNATURE

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DATE

In the matter between

THE MINISTER OF POLICE

Appellant

and

PORTIA MATHIBELA

Respondent

JUDGMENT

BURGER AJ (MAZIBUKO AJ concurring)

[1] The matter is before us with leave of the trial Court.

[2] For purposes of this judgment, I will refer to the parties as cited in the Court *a quo*.

BACKGROUND:

[3] The Plaintiff issued summons against the Defendant in the High Court for damages she allegedly suffered in the amount of R 4 million. The Plaintiff averred that the Defendant should be held vicariously liable for the actions of one of its employees.

[4] The aforementioned emanated from an incident on 16 July 2016 at Winterveld during which a certain Mr Lawrence Seloana (not Seloane or Sebilane) shot the Plaintiff, his erstwhile girlfriend, several times with a firearm which was issued to him by the Defendant.

[5] Seloana was, at the time of the incident, a Constable employed by the Defendant and stationed at Garankuwa Local Crime Record Centre (“LCRC”).

[6] Seloana was not on duty when the incident took place.

[7] The following was common cause between the parties:

- At the time of the incident, there was a family function at the Plaintiff's parental home;

- Seloana suspected that the Plaintiff had a romantic relationship with another man who also attended the function;
- An argument arose between the Plaintiff and Seloana, after which Seloana drew his service pistol and fired several shots towards the Plaintiff and her suspected boyfriend;
- Both the Plaintiff and the suspected boyfriend were wounded, and Seloana took the Plaintiff to the hospital;
- Seloana was arrested and charged with two counts of attempted murder;
- Seloana was also summarily dismissed from his employment with the Defendant after disciplinary steps against him; and
- At the time of the incident, Seloana fired the shots at the Plaintiff with the direct intent to kill her.

[8] By agreement between the parties in the Court *a quo*, the issue of *quantum* was separated from the merits in terms of Rule 33(4) and postponed *sine die*.

[9] The only issue to be determined in the merits, as stated in paragraph 2 of the judgment of Mavundla J, is the question of liability, 'in particular whether the Defendant can be held vicariously liable for the actions of Seloana in shooting the Plaintiff: (i) at a private function; (ii) when he was not in uniform; (iii) travelling in his own motor vehicle; (iv) not on duty; (v) pursuing his own interest {on his own frolic}; and (vi) having deviated from the generally accepted norm.'

PARTICULARS OF CLAIM:

[10] In the particulars of claim, the Plaintiff averred the following:

6.

“The Minister of Police (the Defendant) is held vicariously liable for the conduct of Seloane even if Seloane, at the time of the commission and omission, was not on duty for the following reasons, which will be substantiated with case law at the relevant stage of arguing this matter:

6.1 Seloane used the resources of the Defendant, such as state issued firearm as it is the case herein, to commit an offence;

6.2 In firing a shot at the Plaintiff, Seloane was on a frolic of his own and therefore pursuing his own personal interest;

6.3 On shooting the Plaintiff, Seloane was not acting upon the Defendant's instructions, nor did he further Defendant's purposes or obligations when he did so. He was, subjectively viewed, acting in pursuit entirely of his own objectives and not those of the Defendant;

6.4 Albeit that Seloane was pursuing his own purposes when he fired several shots at the Plaintiff, his conduct was sufficiently close to the Defendant's business to render the Defendant liable in that Seloane bore a statutory and constitutional duty to prevent crime and protect the members of the public, including the Plaintiff. That duty is a duty which also rests on the Defendant, and the Defendant employed Seloane to perform that obligation;

6.5 Section 205(3) of the Constitution mandates the police:

"...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."

6.6 *The conduct of Seloane, which caused harm to the Plaintiff, therefore, constituted a simultaneous commission and omission. The commission lay in his brutal shooting of the Plaintiff. His simultaneous omission lay in his failure to protect the Plaintiff from harm, something which he bore a general duty to do, and a special duty on the facts of this case.*

6.7 *The constitutional rights of the Plaintiff and the constitutional obligations of Seloane, the connection between the conduct of Seloane and his employment with the Defendant is sufficiently close to rendering the Defendant liable.*

6.8 *There is, therefore, a close connection between the wrongful conduct of Seloane and the nature of his employment. There is also an intimate connection between the delict committed by Seloane and the purposes of his employer. This close connection renders the Defendant liable vicariously to the Plaintiff for the wrongful conduct of Seloane.*

6.9 *By providing Seloane with a firearm whilst he was off-duty, the Defendant has created a risk and enabled Seloane to misuse this firearm to harm the Plaintiff.*

7.

7.1 *Seloane, a member of the Defendant, abused his powers by shooting at the Plaintiff without a valid reason to do so. If such a valid reason existed, same would have to be tested in a court of law against the Plaintiff's version.*

7.2 *It shall be further argued at the hearing of this matter that by drawing and using the state-issued firearm, Seloane placed himself on duty in that when the Defendant provided Seloane with a firearm whilst Seloane was off duty, the intention would have been to uphold the constitutional obligations as imposed upon Seloane as and when a need arises whilst off-duty and not to act contrary to such a constitutional obligation to uphold and enforce the law and to protect the lives of the inhabitants of the Republic of South Africa and their property.”*

[11] It is clear from the above that the Plaintiff, *ex facie* the particulars of claim, relied on the following to substantiate her claim that the Respondent be held vicariously liable for the actions of Seloana:

- i. Seloana used his officially issued firearm when he shot the Plaintiff;
- ii. The conduct of Seloana was sufficiently close to the Defendant's business to render the Defendant liable in that Seloana bore a statutory and constitutional duty to prevent crime and protect the members of the public, including the Plaintiff;
- iii. The duty referred to in ii *supra* is a duty which also rests on the Defendant, and the Defendant employed Seloana to perform that duty;
- iv. There is a close connection between the wrongful conduct of Seloana and the nature of his employment; and

- v. By providing Seloana with a firearm whilst he was off-duty, the Defendant has created a risk and enabled Seloana to misuse this firearm to harm the Plaintiff.

[12] I pause here to note that the Plaintiff never applied for the particulars of the claim to be amended.

[13] It was not the case of the Plaintiff that the firearm was unlawfully issued to Seloana nor that Seloana was involved in a previous shooting incident which must have indicated to the Defendant that Seloana cannot be trusted with a firearm. Suppose Seloana was indeed involved in a previous shooting incident. In that case, the Plaintiff must have had knowledge of such an incident, and one would have expected the mentioning of same to appear in the particulars of claim. In addition, if the firearm were unlawfully issued to Seloana, the Plaintiff's own witness (Dokodela Mabasa from IPID), who testified to that effect, would have appraised the Plaintiff timeously to such "unlawful issuing of the firearm to Seloana" by the Defendant. One would have expected the aforementioned to appear in the particulars of claim too.

[14] During the appeal and the argument before us, the Plaintiff took a different stance. The Plaintiff averred that Seloana was involved in another shooting incident prior to the incident *in casu* an official firearm was issued to Seloana whilst his commander (Captain Khoele) was not officially permitted to issue a temporary permit. Seloana was not competent to be in possession of a firearm. Those mentioned above, so was argued, had the effect that the Defendant was negligent in

that the Defendant issued Seloana with an official firearm whilst the Defendant should reasonably have foreseen the re-occurrence of a shooting incident and did not take proper measures to prevent same. (My emphasis).

[15] I am acutely aware of the legal position *in* interference with the judgment of the trial court by the Court sitting on appeal. *It is trite that a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court* [see R v Dhlumayo and Another 1948 (2) SA 677 (A); President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC) paras 78 and 79] *and will only interfere where the trial court materially misdirects itself insofar as its factual and credibility findings are concerned.* In S v Francis 1991 (1) SACR 198 (A) at 198j -199a, the approach of a court of appeal to findings of fact by a trial court was crisply summarized as follows:

'The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection, the trial Court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence. A reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony' (emphasis added).'

[16] In *S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 e-f*, the Court held:

'... in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.'" (emphasis added).

[17] I find that the trial court was clearly wrong with regard to the following:

- i. In ruling in favour of the Plaintiff on grounds which did not form part of the particulars of claim; and
- ii. In finding that a previous incident occurred where Selwane shot someone with 25 rounds and, as a result thereof, the Defendant must reasonably have foreseen the possibility of Selwane misusing the official firearm again.

I will now deal with the above-mentioned in detail and substantiate my findings.

DEPARTURE FROM PLEADINGS:

[18] It is trite that the parties to civil proceedings in South Africa are bound by their pleadings – the object thereof being to delineate the issues to enable the other party to know what case has to be met. Thus, it is impermissible to plead one particular issue and seek to pursue another at the trial. [See: *Minister of Agriculture and Land Affairs and Another v De Klerk and Others [2014] 1 All SA 158 (SCA) at para 39; Gusha v Road Accident Fund 2012 (2) SA 371 (SCA) at para 7; Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 107G-H also reported as*

(1993) 2 All SA 179 (A) and Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 at 198]

[19] This principle was re-stated as recently as 2017 in Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality (225/2016) [2017] ZASCA 77 (2 June 2017) at paras 28-29 as follows (own emphasis added):

“[28] ...One knows that such address can never be a substitute for pleadings. *In any event, it did not serve to forewarn the Respondent of the evidence that would eventually be relied upon. What is important is that the pleadings should clarify the general nature of the pleader's case. They are meant to mark out the parameters of the case sought to be advanced and define the issues between the litigants. In that regard, it is a basic principle that a pleading should be so framed as to enable the other party to fairly and reasonably know the case they are called upon to meet. These requirements in respect of pleadings are the very essence of the adversarial system. The prime function of a judge is to hear evidence in terms of the pleadings, to hear arguments and to give his decision accordingly. In Imprefed (Pty) Ltd v National Transport Co 1993 (3) SA 94 (A) at 107G-H, it was stated: 'At the outset, it need hardly be stressed that: "The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed. (Durbach v Fairway Hotel Ltd 1949(3) SA 1081 (SR) at 1082.)*

[29] *The degree of precision required obviously depends on the circumstances of each case. As a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given*

which explain the basis for the allegation...." [See also: *Yannakou v Apollo Cub* 1974 (1) SA 614 (A) at 623-624]

[20] Furthermore, in this regard, and with reference to the Plaintiff's particulars of claim and its subsequent "change of heart", the extract of Jacob and Goldrein on Pleadings: Principles and Practice, at 8-9, which was endorsed by the Court in *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 898 F-J, and although somewhat lengthy, is instructive of a Court's role in the circumstances (emphasis added):

"As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation

Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and may

thus be a denial of justice. The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference that the parties have chosen and specified in the pleadings. In the adversary litigation system, therefore, the parties set the agenda for the trial by their pleadings, and neither party can complain if the agenda is strictly adhered to. In such agenda, there is no room for an item called “any other business” in the sense that points other than those specified in the pleadings may be raised without notice.” [See also: Trope v South African Reserve Bank 1992 [3] SA 208 (T): at 210G – J:

“It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made (Harms Civil Procedure in the Supreme Court at 263-4). At 264, the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18(12)) amounts to an irregular step, a greater degree of the particularity of pleadings is required. No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading.”

[21] If the Plaintiff is to be confined to her particulars of claim, one must decide, on the face value of the particulars of claim, whether:

- i. the fact that Seloana used an official firearm in the commission of the delict renders it "close enough to the business of the Defendant";
- ii. Seloana was on duty and, as such obliged "to prevent crime and protect members of the public including the Plaintiff";
- iii. providing Seloana with a firearm whilst he was off-duty created a risk and enabled Seloana to misuse the firearm to harm the Plaintiff; and
- iv. Seloana, by drawing and using the state-issued firearm, Seloana placed himself on duty, and as such, the duties referred to in ii *supra* became relevant and applicable.

[22] Before I deal with those mentioned above, the background and scope of work of a member of the Local Criminal Record Centre (LCRC) should be discussed. It is well known that members of LCRC are called upon to visit crime scenes and take photos, make drawings, and collect forensic evidence such as DNA samples and fingerprints, *et cetera*. Members are placed on so-called stand-by duty and must attend to crime scenes at short notice and sometimes at dangerous locations. For the above-mentioned reasons, a member will be issued a firearm to be kept in a prescribed safe at the member's home and only to be taken out and kept on the member's person while the member attends to the crime scene. Only in the above circumstances can a member of LCRC place themselves on duty and again off duty when they return home.

[23] In *Minister of Safety and Security v Nancy Msi* (273/2019) ZASCA 26 (28 March 2019), the Supreme Court of Appeal held:

"The finding of liability based on the mere fact of the SAPS issuing firearm to a police officer amounts to imposition of strict liability, which is impermissible. For liability to arise under such circumstances, there must be evidence that the police officer in question was, for one reason or another, known to be likely to endanger other people's lives by being placed in possession of a firearm, and despite this, they nevertheless were issued with a firearm or permitted to continue possessing it."

[24] In view of the above, paragraph 21 (iii) supra must be answered in the negative. I will return to the findings of the trial court with regard to "a previous incident" herein later.

[25] In the matter of *K v Minister of Safety and Security* 2005 (6) SA 419 CC at paragraph 32, the Constitutional Court held:

"The approach makes it clear that there are two questions to be asked. The test 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, 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 have been done solely for the purposes of the employee, there is nevertheless a sufficiently close link between the employee's act for his own interest and the purpose and business of the employer. This question does not raise purely factual questions but mixed questions of fact and law. The question of law raises relates to what is 'sufficiently' to give rise to vicarious liability."

[26] I cannot find that Seloana placed himself on duty on a fateful night merely because he had the state-issued firearm. In addition, Seloana could not place himself on duty whilst attending a party that had nothing to do with the Defendant's business. The fact that Seloana specifically used the firearm to injure the Plaintiff does not take the matter even further. Under the circumstances, the firearm was but the nearest tool to use in Seloana's effort to harm the Plaintiff. I have no doubt that Seloana would have used the nearest weapon, be it a knife, stick or anything else, to accomplish in his goal to harm the Plaintiff and her suspected lover.

[27] Seloana knew that he may not possess said firearm for non-official purposes. He was well aware that the specific firearm should be stored in his safe at home and only taken out if he was to attend a crime scene in an official capacity.

[28] Seloane was on a private and social visit to his lover, not there in his capacity as a police officer and had no official police function to perform. At the time of the shooting, Seloane and the Plaintiff were relating as lovers in a home setup, not as police officers and citizens. The Plaintiff placed her trust in Seloane as her lover, not because of his employment as a police officer. No circumstances triggered the police

in Seloane or called upon him to act as a police officer at the time of the shooting at the home setup. In view of the above, I find that paragraphs 21 (i), (ii) and (iv) should also be answered in the negative.

[29] Considering all the facts and in view of the specific averments made in the particulars of claim, I find that a sufficiently close link between the employee's act for his own interest and the purpose and business of the employer does not exist.

[30] On this basis alone, the appeal should be successful.

ISSUING OF FIREARM AND PREVIOUS INCIDENT

[31] It is common cause that an official 9-millimeter pistol was issued to Seloana.

[32] According to the official records (Record Page 108), Seloana passed his competency training in 2013. He also passed the proficiency tests during the same year. I pause here to deal with the difference between competency and proficiency. A person is competent to possess a firearm when trained in the legal aspects of gun ownership, as well as a practical demonstration that the person is proficient to handle the firearm in practice, *i.e.* they have to be able to hit a target at a specific distance. The proficiency tests apply to Official Institutions that issue firearms to their employees.

[33] It is common cause that Seloana was competent during 2013 to be in possession of an official firearm. The incident took place in 2016. It is uncertain from the record whether Seloana did not attend proficiency tests during 2014, 2015 and 2016 or whether the SAPS did not provide for such tests due to financial constraints. The fact remains that Seloana was competent to possess a firearm in 2013, and nothing suggests that he was declared incompetent to possess same at any time between 2013 and the date of the incident. I am unable to comprehend how passing of an annual proficiency test can render a person fit or unfit to possess a firearm. It is trite that only a declaration of incompetency can affect the competency status of a firearm owner/possessor.

[34] In his testimony before the trial court on behalf of the Plaintiff, Mr Dokodela Mabasa (IPID) admitted two very important facts:

- i. That Captain Khoele was permitted to issue a temporary permit to a member under his command (Record Page 34, lines 11 to 16); and
- ii. Seloana did not have any previous criminal or disciplinary convictions prior to the incident where the Plaintiff was injured. (Record Page 51, line 18 to Page 52, line 2).

[35] The aforementioned is in stark contrast with the decision the trial court eventually came to concerning a previous incident. I have no doubt that Mr Mabasa, having been the investigating officer in the criminal case against Seloana, would have been in the best position to appraise the trial court with regard to the previous conduct of Seloana.

[36] Captain Khoele testified as follows:

- i. At the time the temporary permit to possess an official firearm was issued to Seloana, Captain Khoele was the authorised officer at Seloana's unit to issue such permits;
- ii. At the time of the incident, the Plaintiff was injured; Seloana did not have previous convictions, either criminal or disciplinary; and
- iii. The witness was surprised when he heard about the Plaintiff's incident. According to the witness, Seloana was very competitive and hard-working as a defendant member.

[37] During the cross-examination of Captain Khoele, a huge misunderstanding occurred. Said misunderstanding was amplified by Mavundla J in his judgment in favour of the Plaintiff and was also the primary reason for finding that the Defendant was vicariously liable for the actions of Seloana. The record reads as follows (Record Page 80, line 11 to Page 81, line 1):

"You disciplined Mr Seloane internal? Is that not so? --- That is correct, My Lord.

And what was the purpose of the discipline? --- It was a corrective measure My Lord that we usually do whenever misconduct has been ascertained.

What was the misconduct? --- The misconduct was prior to the case that was opened against him, My Lord.

What was the misconduct? Was the misconduct that ... What was the misconduct? Let me just ask that. --- The misconduct was the fact that he would have shot somebody, My Lord.

With what? --- With a firearm.

Whose firearm was that? --- The firearm that was issued to him by the state.

With 25 rounds of ammunition? --- Yes, that is correct, My Lord."

[38] It is obvious from the context of the particular line of cross-examination that counsel for the Plaintiff wanted to emphasize that Seloana used a state-issued firearm to commit misconduct and that the Defendant acted internally against Seloana as a result thereof. This was obviously an attempt to show that the actions of Seloana triggered a severe internal response from the Respondent. Therefore, the actions of Seloana can be regarded as "sufficiently close" to the Defendant's business. If the answers from Captain Khoele, at that specific point in time, warranted an inference that another shooting incident occurred prior to the incident involving the Plaintiff, counsel for the Plaintiff was oblivious to same. Neither the trial court nor the Defendant's counsel made such an inference either. Otherwise, one would have expected at least questions as to where, when and how did this previous incident occur. Not a single party to the proceedings proverbially lifted a finger to clarify such an important and new fact. It begs for the only reasonable inference to be drawn that no such previous incident took place. The inference above is also corroborated by the testimonies of Mr Mabasa and Captain Khoele in paras 34 and 36 *supra*.

[39] On the question as to whose firearm was that, Captain Khoele answered that it was a state-issued firearm (see 36 *supra*). The next question related to the number of rounds issued with a firearm, *i.e.* 25 rounds. If one looks at the temporary permit (Record Page 89), it is evident that Sloane was issued a 9 mm pistol and 25 rounds. It is simply wrong to infer from the above that a previous incident occurred where Seloana shot somebody with 25 rounds.

[40] In the result, I propose the following order;

1. The appeal is upheld, and the finding of Mavundla J on 15 January 2020 that the Appellant (Defendant *a quo*) is liable to compensate the Respondent's (Plaintiff *a quo*) proven damages is set aside.

2. The order of the Court *a quo* is substituted with the following:

'The claim is dismissed with costs, including costs of two counsel where so employed.'

K. BURGER AJ

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION: PRETORIA

I agree it is so ordered

N. MAZIBUKO AJ

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION: PRETORIA

Mazibuko AJ concurred in the judgment of Burger AJ

Makhoba J

Introduction

1. I have read the judgment of my brother Burger AJ. With respect I disagree with his reasons for judgment, I am of the view that the appeal should be dismissed with costs.
2. Burger AJ has already summarised the facts and the evidence tendered in the court *a quo* I am not going to repeat same in this judgment but only give my reasons for dismissing the appeal.

Common Cause

3. It is common cause that the respondent was shot and injured by Constable Sebiloane using the official South African Police Service (SAPS) issued fire arm. It is common cause that constable Sebiloane was in the employ of the defendant at the time of the incident. After this incident constable Sebiloane was dismissed by the SAPS.

The issue

4. The respondent seeks to hold the appellant vicariously liable for the injuries she sustained as a result of being shot by her boyfriend on the 16th

July 2016. At the time of the shooting, constable Sebiloane was in the employ of the appellant but not on duty. It is alleged by the appellant that at all material times constable Sebiloane was on a frolic of his own.

Submissions

5. On behalf of the appellant counsel submits that the court *a quo* erred in its interpretation of the facts in respect of both the appellant and the respondent¹.

6. On behalf of the respondent counsel dispute the submissions by the appellant, she labels them as “appellants own re-invention, which re-invention is erroneous”². It is submitted further that there was no evidence before the court *a quo* suggesting that constable Sebiloane had shot at the respondent 25 (twenty-five) times.

7. The case law referred to by the appellant was indeed also referred to and acknowledged by the court *a quo* in its judgment on paragraphs 4,5 and 6 of its judgments³.

8. The court *a quo*'s reasons for the judgment can be summarised as follows:

¹ Vide caselines 004031 paragraph 19

² Vide caselines 005-9

³ Vide caselines 003-120-121

- 8.1 Constable Sebiloane was not competent to possess and be issued with a firearm.
 - 8.2 The person who issued constable Sebiloane with a temporary competency certificate namely captain Khoele was himself in terms of Regulation 79 not competent to issue such a certificate.
 - 8.3 In terms of section 48 of the Act, constable Sebiloane was not entitled to be issue with firearm when he is off duty.
 - 8.4 Captain Khoele conceded during his testimony that constable Sebiloane was prior to the shooting incident in *casu*, internally disciplined for misconduct. He was disciplined for shooting a person with an official firearm.
 - 8.5 By possessing the fire arm, constable Sebiloane contravened section 77 of the regulations read with section 98 of the Act.
9. In paragraph 15 of his judgment Mavundla J came to the conclusion rightly so in my view that *“In casu, there was an omission on the part of the defendant, in not ensuring that Sebiloane surrendered his fire arm when he went off duty on that unfortunate day of the shooting”*⁴.

⁴ Vide caselines 003-123 page 118 of the judgment

10. The court a quo further gives a full exposition of the law and the facts in its paragraphs 17-18 of the judgment⁵.
11. In *K v Minister of Safety and Security*⁶ par 26 reads as follows “*It is clear that an intentional deviation from duty does not automatically mean that an employer will not be liable*” It is clear from this quotation that the constitutional court did not declare vicarious liability unconstitutional.
12. In this matter before us, there was an omission on the part of the defendant in failing to retrieve the firearm from Sebiloane when he went off duty as Mavundla J has found.
13. In *K v Minister of Safety and Security*⁷ the constitutional court stated that the common law test for vicarious liability in deviation cases needs to be applied to new sets of facts in each case in the light of the spirit, purport and objects of our constitution.
14. The reasoning of Mavundla J about the omission on the part of the defendant is supported by the constitutional court decisions in *K v Minister of Safety and Security*⁸ where the court said the following: “*The question of the simultaneous omission and commission may be relevant to wrongfulness in a particular case, but it will also be relevant to determining the question of vicarious liability. In particular, it will be relevant to answering the second question set in Rabie: was there a*

⁵ Vide caselines 003-124 page 119 of the judgment

⁶ Vide caselines 003-124 page 119 of the judgment

⁷ 2005 (6) SA 419 (CC) at page 434

⁸ *K v Minister of Safety and Security* supra on page 442 par 45

sufficiently close connection between that delict and the purposes and business of the employer?”

15. In my view, the conduct of Sebilwane which caused harm to Ms Mathibela constituted simultaneous commission and omission by the employer in seeing to it that he does not take the firearm home with him.⁹

16. Again, it is my respective view that there was a close connection between the wrongful conduct of Sebilwane and the omission of his employer.¹⁰

17. Furthermore, it is my view that Mavundla J exposition of the applicable law to the facts of this case cannot be faulted.

18. I would have made the following order:

18.1 The appeal is dismissed.

18.2 The appellant to pay costs, such costs to including the costs of two counsel.

⁹ K v Minister of Safety and Security supra on page 443 par 49

¹⁰ K v Minister of Safety and Security supra on page 444 par 53

D. MAKHOBHA

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

REFERENCES

For the Appellant: Adv PJJ de Jager SC

Instructed by: The State Attorney, Pretoria

For the Defendant: Adv Mpshe SC

With: Adv GDM Dube

Instructed by: Maoba Attorneys Inc.

Heard on: 15 August 2022

Judgment delivered on: 02 November 2022