

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between

THIRUMANLY MOODLEY

APPELLANT

- and -

MINISTER OF LAW AND ORDER

RESPONDENT

CORAM: BOTHA, HEFER, NESTADT, NIENABER JJA et NICHOLAS
AJA.

HEARD: 9 May 1994. DELIVERED:

23 May 1994.

J U D G M E N T

NICHOLAS AJA.

NICHOLAS AJA:

Mr K Adam was a police constable in the South African Police attached to the Mobile Unit based at the Laudium Police Station near Pretoria. At 21h45 on 5 October 1989 he reported for duty at the police station and was assigned to guard the house of a member of parliament. During the evening he developed stomach pains and left his post with permission in order to go to a toilet at the police station. Finding all the toilet facilities occupied, he went to the house of Miss Thirumanly Moodley, a young woman of some 25 years with whom he had previously had an affair and who lived near the police station. He was carrying in a holster the service pistol which had been officially issued to him for use in connection with his police duties. This he removed from the holster and left outside when he entered the toilet in the yard of the

Moodley premises. When he emerged he picked up the pistol. Noticing Moodley in the kitchen of the house he called her to come outside. He put his arms around her, still holding the pistol in his hand as he did so. The pistol went off. In consequence Moodley sustained serious injuries.

Arising out of this incident, Moodley instituted an action for damages in the Transvaal Provincial Division against the Minister of Law and Order as the first defendant and Adam as the second defendant. The plaintiff's particulars of claim contained the following allegations in regard to the liability of the defendants :

'4.

On or about the 5th day of October 1989 and at LAUDIUM, TRANSVAAL the Second Defendant wrongfully, unlawfully and intentionally shot the Plaintiff with his service pistol.

5

At all material times the Second Defendant was employed by the First Defendant and acted within the course and scope of such employment.

7.

As a result of such shooting the plaintiff suffered a gun shot wound in her back resulting in spinal damage and permanent paralysis from the waist down ..."

She claimed payment of damages totalling R924 145-12.

In a joint plea the defendants denied each of the allegations contained in paragraphs 4, 5, 6 and 7 of the particulars of claim.

The trial was held before SWART J on 23 April 1992. No evidence was led, but there was submitted to the Court in terms of Rule 33(1) of the Rules of Court

a written statement of agreed facts. It reads as follows:

"The parties to the above action agree upon the following statement of facts for the adjudication of the Court:

1.

2nd Defendant was, at all times relevant to this action, a police constable in the South African Police and, as such, employed by the 1st Defendant.

2.

Each and every of 2nd Defendant's negligent acts or omissions set out in paragraph 3 hereof was the direct cause of the injuries sustained by Plaintiff when the service pistol (a 9mm Walther P38 double action pistol) issued to 2nd Defendant by 1st Defendant was accidentally fired on the 5th of October 1989.

3

The 2nd Defendant negligently caused the injuries sustained by the Plaintiff on the 5 th day of October 1989, in that -

3.1 contrary to 1st Defendant's standing orders regarding the safe handling of firearms issued to officers, 2nd Defendant -

3.1.1 carried his service pistol with a round in the chamber, the hammer cocked and without engaging its safety mechanism, thereby making it possible for the service pistol to be fired accidentally;

3.1.2 failed to take all reasonable steps to ensure that his service pistol is, at all times, safe and cannot be fired accidentally;

3.2 2nd Defendant tried to hug Plaintiff while his pistol was not in his holster but held in his hand and while the service pistol was in the unsafe condition described in sub-paragraph 3.1.1.

4.

Plaintiff's injuries were caused partly by her own fault and the parties furthermore agree that, in terms of section 1 of the Apportionment of Damages Act, 1956, any damages recoverable by Plaintiff from either of the Defendants shall be reduced by the Honourable Court by the deduction therefrom of 25% of the amount of such damages.

5

It is 2nd Defendant's duty as a police officer in the employment of the 1st Defendant at all times (unless prevailing circumstances are such that the 2nd Defendant may be justified in using the service pistol in the course of the execution of his duties) to -

5.1 carry his service pistol in such a manner that it cannot be fired accidentally and to insure that -

3.1.3 his service pistol does not have a round in the chamber;

and

3.1.4 the hammer of his service pistol is uncocked; and

3.1.5 the safety mechanism of his service

pistol is engaged; 5.2 take all reasonable steps to ensure that his service pistol is safe and cannot be fired accidentally.

6

At the time when the shot which injured Plaintiff was fired there were no circumstances which justified 2nd Defendant to use his service pistol in the execution of his duties and, for that reason, 2nd Defendant had to comply with his duties regarding the safe use, handling and carrying of his service pistol as more fully set out in paragraphs 5.1 and 5.2 hereof.

7.

The relevant events which preceded the accidental shooting of the Plaintiff on the 5th of October 1989 were the following:

7.1 2nd Defendant, dressed in full uniform, was booked on duty at the Laudium police station at 21h45 and was issued with a service pistol and 8 rounds of 9mm ammunition, all of which form part of the standard equipment issued to

all officers in the employment of the 1st Defendant for use by such officers in the execution of their duties as police officers;

3.1.6 2nd Defendant was posted on guard duty at the home of a member of parliament;

3.1.7 later that evening, while still on duty, 2nd Defendant developed a stomach ache and requested permission to leave his post and to return to the police station to use the toilet;

3.1.8 2nd Defendant was granted the permission requested and was transported by police van to the police station where he found that the toilets at the police station were all engaged;

3.1.9 Plaintiff's house is near the police [station] and 2nd Defendant, being acquainted with Plaintiff (because he previously had an affair with her), went to Plaintiff's house to use the toilet which is situated outside, at the back of the house;

3.1.10 2nd Defendant removed his service pistol from his holster before using the toilet, leaving it lying outside the toilet;

3.1.11 after using the toilet, 2nd Defendant left the toilet and picked up his service pistol from the place where he left it;

3.1.12 before 2nd Defendant replaced the service pistol into his holster, he noticed Plaintiff in the kitchen, called her outside and, after she came out of the house, he tried to hug her by placing his arms around her while holding the service pistol in his hand in such a manner that the service pistol was held behind her back;

3.1.13 whilst in the position described in the previous paragraph, the service pistol was accidentally fired, injuring Plaintiff and 2nd Defendant;

3.1.14 2nd Defendant was never booked off duty and was still on duty when the shot was fired.

8

In view of the aforesaid facts the parties agree that -

8.1 this Court should grant judgment against 2nd Defendant for -

8.1.1 payment of an amount equal to 75% of the total amount of the damages sustained by Plaintiff, which total amount is to be determined by agreement by the parties or, if no agreement can

be reached, by this Honourable Court after the matter has been re-enrolled by either of the parties; 8.1.2 payment of Plaintiff's costs to date;

3.1.15 the only remaining dispute between Plaintiff and 1st Defendant is the question whether, having regard to the written statement of facts set out herein, 1st Defendant is vicariously liable for the damage caused by 2nd Defendant when he injured Plaintiff;

3.1.16 should the Court find that 1st Defendant is vicariously liable for the damage caused by 2nd Defendant to Plaintiff, then this Honourable Court should grant judgment against 1st Defendant, jointly and severally with the judgment to be granted against 2nd Defendant for -

3.1.17 payment of an amount equal to 75% of the total amount of the damages sustained by Plaintiff, which total amount is to be determined by agreement by the parties or, if no agreement can be reached, by this Honourable Court after the matter has been re-enrolled by either of the parties;

3.1.18 payment of Plaintiff's costs to date.

8.4 should the Court find that 1st Defendant is not vicariously liable for the damage caused by 2nd Defendant to Plaintiff, then this Honourable Court should dismiss Plaintiff's claim against 1st Defendant with costs."

After hearing argument, SWART J granted judgment against the second defendant in terms of the agreed statement of facts. In regard to the first defendant, the learned judge found that he was not vicariously liable for the damage caused by the second defendant to the plaintiff and dismissed the plaintiff's claim against the first defendant with costs.

SWART J granted leave to the plaintiff to appeal to this Court and directed that the costs of the application for leave be costs in the appeal.

Under paragraph 8.2 of the statement of facts, only one matter was left for the decision of the trial court, namely, "whether, having regard to the written

statement of facts ... [the Minister] is vicariously liable for the damage caused by [Adam] when he injured [Moodley]."

The well established principle in regard to vicarious liability is that a master is liable for harm caused to third parties by the wrongful act of an agent if such agent is a servant and if such act is done in the exercise of the functions to which the servant has been appointed. See *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 735-6. Cf *Minister of Police v Rabie* 1986(1) SA 117(A) which was discussed in *Minister of Law and Order v Ngobo* 1992(4) SA 822(A).

In considering whether the principle relating to vicarious liability applies in this case, it is necessary first to identify "the wrongful act" of Adam which caused the damage sustained by Moodley. The statement of facts does not in terms identify the wrongful act. It was identified in the plaintiff's

particulars of claim in which it was alleged in paragraph 4 that "the Second Defendant wrongfully, unlawfully and intentionally shot the Plaintiff with his service pistol", and in paragraph 7, where it was alleged, "As a result of such shooting the Plaintiff suffered a gun shot wound in her back...". It was referred in paragraph 3 of the statement of facts :

"The 2nd Defendant negligently caused the injuries sustained by the Plaintiff on the 5th day of October 1989, in that -

3.2 [The] 2nd Defendant tried to hug Plaintiff while his pistol was not in his holster but held in his hand and while the service pistol was in the unsafe condition described in subparagraph 3.1.1."

Paragraph 2 of the statement of facts refers to "the injuries sustained by Plaintiff when the service pistol ... was accidentally fired ...". And in paragraph 7.9 it is said that "... the service pistol was

accidentally fired, injuring Plaintiff ...".

It was nevertheless argued by counsel for Moodley that Adam's wrongful act consisted not in the hugging of Moodley by Adam, but in his negligent failure to carry out his duties as a police officer in regard to the safe use, carrying and handling of the service pistol issued to him, which failure directly resulted in the accidental discharge of the service pistol and caused the injuries. It was contended that this is what was agreed by the parties in paragraph 2 of the statement of facts.

That paragraph is not a model of draftsmanship: it is confused and unclear. I am nevertheless satisfied that it does not bear the meaning for which counsel contended.

It begins with the words, "Each and every of 2nd Defendant's negligent acts or omissions ...". The Shorter Oxford English Dictionary defines the two words

each and every in terms of one another. The definition of each is "Every (one of two or more) regarded separately"; that of every is "Each of a group; all taken one by one". Their use in conjunction is reminiscent of the tautology of the pleader who traverses multiple allegations in a declaration by saying, "The defendant denies each and every allegation contained in paragraph 5 as specifically as if herein set forth and severally traversed". But it could not have been the intention of the parties to agree in the statement of facts that each of the separate acts or omissions set out in paragraph 3 was in and by itself the direct cause of the plaintiff's injuries. If that had been intended, they would have said that each was a direct cause. Moreover none of the separate acts and omissions set out in paragraph 3.1.1 (carrying the pistol with a round in the chamber, with the hammer cocked and without engaging its safety mechanism) and in

paragraph 3.1.2 (failure to ensure that his service pistol was safe and could not be fired accidentally) was in itself and without more capable of causing the plaintiff's injuries. Furthermore it is plain that in paragraph 3.1 the parties were not seeking to identify the "wrongful act" but were setting out the respects in which the act referred to in paragraph 3.2 was negligent.

The second inquiry is whether the wrongful act (the shooting) was done in the exercise of the functions to which the servant was appointed, or as it is usually put, in the course and scope of his employment. More specifically in the present case, the question is whether Adam was doing the State's work, viz police work, when he fired the shot which injured Moodley. Cf. *Minister of Police v Rabie*, supra, at 132 G-H.

It was not contended on behalf of the appellant that the attempt by Adam to embrace Moodley

was an act done by Adam in the exercise of the functions to which he had been appointed, that he was then doing police work, or that he was acting in the course or scope of his employment as a policeman. Rightly so. Adam was on an amatory frolic of his own. The mere fact that he was at the time in breach of his duties as a policeman in regard to the handling of the pistol which had been issued to him does not fix the State with vicarious liability.

In my opinion SWART J was clearly right in his conclusion. The appeal is dismissed with costs.

H/C NICHOLAS AJA.

BOTHA JA)
HEFER JA)
NESTADT JA)
NIENABER JA) Concur.