REPORTABLE

Case No: 413/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

BENNETT MADALA MKHATSWA **APPELLANT**

and

MINISTER OF DEFENCE **RESPONDENT**

CORAM: SMALBERGER, VIVIER, HOWIE, STREICHER JJA and MELUNSKY AJA

DATE OF HEARING: 19 NOVEMBER 1999

DELIVERY DATE: 29 NOVEMBER 1999

Delict - vicarious liability - negligence not established on the facts for alleged omissions by those in control of military base or acts of sentries on duty - for a fuller summary see para 39.

JUDGMENT

. . . SMALBERGER JA

SMALBERGER JA:

[1] It is common cause that in the early hours of 25 May 1992 the appellant was forcibly removed from his home in Tamboville by members of the then South African Defence Force ("the Defence Force") who were off duty at the time. He was taken to a nearby road where he was severely assaulted. In the course of the assault he was struck in the face with a rifle butt resulting in the loss of his right eye.

[2] Arising from this incident the appellant (as plaintiff) instituted action against the respondent (as defendant) in the Witwatersrand Local Division for damages in the sum of R186 050,00. (For convenience' sake I shall continue to refer to the parties as they were known at the trial.) The matter came before Gautschi AJ. With leave of the court the trial proceeded on the issue of liability only. At its conclusion the learned acting judge found for the plaintiff, holding that the defendant was liable for any damages suffered by him as a result of the assault.

[3] The defendant sought and was granted leave to appeal to the full court of the Witwatersrand Local Division. The appeal succeeded and the trial court's order was altered to one dismissing the plaintiff's claim with costs. The judgment is reported - see *Minister of Defence v Mkhatswa* [1997] 3 All SA 376 (W). The plaintiff was subsequently granted special leave to appeal to this Court.

[4] In May 1992 21 SA Infantry Battalion was stationed at Lenz military base on the West Rand. Its ranks included D company, a

platoon of troops mounted on horseback and motor cycles, and A company, a platoon of guards. The members of D company were all permanent force members with experience ranging from four to seven years. Many of them were married with children and resided in established areas.

[5] At that time the Defence Force's Group 16 commanded a certain geographical area on the East Rand. Incorporated within its area were, *inter alia*, the township of Wattville, the adjoining informal settlement of Tamboville and a military base known as "Apex". Tamboville was situated approximately five kilometres from Apex base as the crow flies.

[6] Because of prevailing discontent in certain communities, some areas under the command of Group 16 had been declared unrest areas. Wattville and Tamboville were not included amongst these. Group 16 did not have soldiers at its disposal to deploy in these unrest areas. A and D companies were drafted for this purpose. The function of D company was to patrol the affected areas on horseback and motor cycles in collaboration with members of the South African Police. Patrols were confined to daytime because of the heightened danger associated with night patrols.

[7] During their deployment in these areas A and D companies (together comprising approximately 70 soldiers) were stationed and billeted at Apex base. It was a small base and provided the only accommodation available for soldiers operating within the area of Group 16. The base was used infrequently for operational purposes and served primarily as the headquarters of a commando.

[8] The members of D company were initially due to complete their operational duties on Friday 22 May 1992 and thereafter to return to Lenz base. However, because of a further need for their services over the weekend, their spell of duty was extended to the Sunday. In order to pacify the disgruntled members of D company, and partly to compensate them for the delayed return to their base and, more significantly, their homes, it was arranged that certain allowances due to them would be paid on the Saturday rather than only after their return. This was duly done.

[9] D company returned to Apex base on Sunday 24 May 1992 at approximately 16h00 upon completion of its patrol duties. The rifles which had been issued to its members were returned and locked away. The only soldiers at the base left in possession of rifles were the six guards who were due to perform rotational guard duty that night.

[10] After having changed and eaten, seventeen members of D company left Apex base in different groups. There were no canteen facilities available at Apex base, the canteen having been closed temporarily because of theft. They proceeded on foot to a shebeen in Wattville, not far from its border with Tamboville. Some stayed there longer than others. When the last of them (a group of nine) departed they were somewhat intoxicated. They decided to take a short-cut to Apex base through Tamboville. While on their way they were confronted by residents of Tamboville patrolling the area. An altercation ensued, ending up in a fight. The soldiers came off second-best and scattered and fled the scene.

[11] There is uncertainty conce

rning the precise events that occurred subsequently. What has been established, however, is that riflem

an Lawer lot returned to Apex base where he unlawfully took possession of a Samil 50 military truck

(“the Samil 50") and a number of army issue rifles. He then went back to Tamboville apparently bent on

reven ge. *En route* he picke d up some of his fellow soldie rs who had been involv ed in the prior clash.

In the course of the ensuing foray several innocent persons were dragged from their homes and the

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[12] On the day of the assault D company's commander, Captain Rademeyer, was on leave. His second in command was Second Lieutenant Botha. He was only 18 years of age. Because of his lack of experience, Warrant Officer Scheepers was appointed acting company commander in Rademeyer's absence. Scheepers left Apex base at approximately 19:00, leaving Botha in charge during the period when the relevant events occurred.

[13] The absence at the time of canteen facilities, an important feature of army life, has already been mentioned. It is common cause that the perimeter fence of Apex base was in a dilapidated state making it possible for soldiers to leave and return to the base on foot without having to go past the sentries at the main gate. Colonel de

Bruin, the commanding officer of Group 16, conceded in evidence that at the relevant time there were deficiencies in the command and control structures at the base. According to Botha "things were very lax at Apex base". No clear guidelines in respect of discipline and leave were issued to members of D company in relation to their stay there. This led to confusion with regard to whether they were entitled to leave the base after going off duty. As permanent force members they could do so at Lenz base. They were apparently under the impression that this situation also applied at Apex base. Scheepers was of the same view. So too was Colonel Scholtz, who presided over the later Defence Force inquiry into the events of the night in question. De Bruin, Botha and Lieutenant-Colonel Smit, the staff officer of Group 16, thought differently. They considered the members of D company to be on stand-by and as such not entitled to leave the base without special permission. However, it is clear that nothing was done to make this known to them.

[14] It is apparent from the evidence that the state of affairs that existed at Apex base at the time as to administration and discipline left much to be desired. However, whatever valid criticism this may give rise to must not be allowed to obscure the true issues on appeal.

[15] The Standing Orders for Apex base (available in the record only in Afrikaans) provided, *inter alia*, that "geen militêre voertuig sal die

basis verlaat sonder ‘n geldige ritmagtiging nie” and “geen persoon sal die basis binne gaan of verlaat anders as deur voorgeskrewe toegangsweë nie”. Provision is also made in the Standing Orders for the proper supervision and control of weapons.

[16] According to the evidence, the sentry system is designed to protect the base from outside incursions rather than to keep soldiers in. Nonetheless the sentries would not normally permit a soldier to leave the base without the necessary authority, where such is required. Sentries are also there to try to ensure that the unauthorised removal of military vehicles and firearms does not take place.

[17] The plaintiff seeks to hold the defendant vicariously liable for (1) the alleged wrongful omissions of those in command of Apex base and (2) negligence on the part of the sentries while acting in the course and scope of their employment. I shall deal with each of these in turn. I should point out that the second issue appears to have received scant attention both in the trial court (where it was not relied upon to found liability) and the court *a quo* (where it was not alluded to at all in the judgment of the court as a possible basis for liability on the part of the defendant). On appeal before us it was dealt with by the plaintiff’s counsel very much as a subsidiary issue - almost as an

afterthought.

[18] Liability for the alleged wrongful omissions is predicated on the principles laid down in *Minister van Polisie v Ewels* 1975(3) SA 590 (A). However, before those in command of Apex base (and the defendant vicariously) can be held responsible for any wrongful omission, it must be established that they were negligent in failing to guard against and prevent reasonably foreseeable harm to the plaintiff. The question of negligence (i.e. the failure to comply with the standard of conduct of a reasonable person) is the logical starting point to any enquiry into the defendant's liability, for without proof of negligence the plaintiff cannot succeed in his action and considerations of wrongfulness and remoteness (legal causation) will not arise.

[19] Subject to the qualification to be mentioned later, in determining the issue of negligence I shall apply, as urged upon us by counsel for the plaintiff, the well-known and widely approved test for negligence enunciated by Holmes JA in *Kruger v Coetzee* 1966(2) SA 428 (A) at 430 E - F rather than any later adaptation thereof (see *Mukheiber v Raath and Another* 1999(3) SA 1065 (SCA) at 1077 E - F which (and I say this despite the fact that I was a party thereto) might give rise to some uncertainty as to what was sought to be conveyed - see in this regard the remarks of Scott JA in para 21 of the hitherto unreported majority judgment in the matter of *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* (the "Sea Harvest case") delivered on 26 November 1999).

[20] The test referred to in *Kruger v Coetzee* reads:

> "For the purposes of liability *culpa* arises if-
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> *(a)* a *diligens paterfamilias* in the position of the defendant-
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> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
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> (ii) would take reasonable steps to guard against such occurrence; and
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> *(b)* the defendant failed to take such steps."

[21] It is only if the requirement in (a)(i) is established that the need arises to consider whether a reasonable man in the position of those in command of Apex base would have guarded against any foreseeable occurrence and failed to do so.

[22] The qualification to which I have referred is to be found in para [22] of the majority judgment in the *Sea Harvest* case where Scott JA remarked:

> "It is probably so that there can be no universally applicable formula which will prove to be appropriate in every case."

He went on to state:

> "Notwithstanding the wide nature of the inquiry postulated in paragraph (a)(i) of Holmes JA's formula - and which has earned the tag of the absolute or abstract theory of negligence - this court has both prior and subsequent to the decision in *Kruger v Coetzee* acknowledged the need for various limitations to the broadness of the inquiry where the circumstances have so demanded. For example, it has been recognized that while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable.

> (See generally: *Kruger v Van der Merwe and Another* 1966(2) SA 266 (A), *Minister van Polisie en Binnelandse Sake v Van Aswegen* 1974(2) SA 101 (A) at 108 E - F and also *Robinson v Roseman* 1964(1) SA 710 (T) at 715 G - H. For examples of where the manner in which the harm occurred was held not to have been reasonably foorseeable, see *S v Bochris Investments (Pty) Ltd and Another* 1988(1) SA 861 (A); *Stratton v Spoornet* 1994(1) SA 803 (T).)"

Later in the same paragraph, in which reference is made to the need for a degree of flexibility, he continued:

> "Too rigid an approach in borderline cases could result in attributing culpability to conduct which has sometimes been called negligence 'in the air'."

He ultimately concluded:

> "Inevitably the answer will only emerge from a close consideration of the facts of each case and ultimately will have to be determined by judicial judgment."

[21] The last quotation is a salutary reminder of the fact that whether or not conduct constitutes negligence ultimately depends upon a realistic and sensible judicial approach to all the relevant facts and circumstances that bear on the matter at hand. What also needs to be

emphasized is that what is required to satisfy any test for negligence is foresight of the *reasonable* possibility of harm. Foresight of a mere possibility of harm will not suffice.

[22] Reverting to the facts. The members of D company completed their stint of duty on the Sunday afternoon. They were due to return to Lenz base the following day. They were probably still somewhat annoyed at having to stay at Apex base longer than had been anticipated. Their allowances had been paid to them the previous day. No canteen facilities were available at the base. The temptation to seek liquor elsewhere was great. They had been given no specific instructions to remain at the base. It was a known fact that the inhabitants of the townships were generally not well-disposed towards soldiers. Given these circumstances it was reasonably foreseeable on the part of those in command of Apex base that members of D company might leave the base in search of liquor in a nearby township. Once there the danger existed of their identity being discovered, particularly if they became inebriated. The same would hold true if they were confronted on their way back through Tamboville, which is in fact what happened. The reasonable possibility of a violent altercation ensuing and harm being caused to

someone in the process, or in the course of any immediate retaliation, was in my view also reasonably foreseeable by those in command.

[23] However, in the particular circumstances of this case the question of culpability must ultimately be determined not in relation to the foreseeability of the events just described, but with regard to whether those in command at Apex base could reasonably have foreseen that some substantial time thereafter one of the soldiers (Lawerlot) would return to the base and wrongfully appropriate the Samil 50 and a number of rifles in order to mount, with the aid of colleagues, what amounted to a revenge attack involving innocent inhabitants of Tamboville rather than those with whom they had previously clashed. The members of D company were disciplined and experienced soldiers - in some respects (according to the evidence) the cream of the infantry - from whom conduct of this kind could not reasonably be expected. There was no evidence of any previous incidents at Apex base involving the misappropriation or misuse of vehicles and particularly rifles which could have served as a warning to those in command. Furthermore, there were structures in place in the form of sentries to try to prevent the unauthorised removal of vehicles and rifles from the base. In my view the reasonable

possibility of these events occurring and harm ensuing to the plaintiff would not have been foreseen by a reasonable person in the position of those in command. To have foreseen what happened would have required prophetic foresight, which is not an attribute of the reasonable person. (See *S v Bochris Investments (Pty) Ltd and Another* 1988(1) SA 861 (A) at 867 A.) Consequently there can be no fault on their part for not taking steps to prevent what was not reasonably foreseeable.

[24] I understood counsel for the appellant ultimately to concede this to be so. He contended, however, that those in command could reasonably have foreseen that rifles might unlawfully be removed from Apex base and be used to cause harm; they should have guarded against this happening, but failed to do so. Such failure was ascribed to laxity of control at the base, laxity which it was suggested permeated the conduct of everyone in command or on duty. The fact that the Standing Orders were designed to forestall the unlawful removal of firearms from the base, so it was argued, was indicative of foresight of the reasonable possibility of this happening.

[25] Leaving aside any question of causation, an inevitable stumbling- block in the plaintiff's pursuit of success, the facts and

circumstances do not justify the finding of reasonable foresight for which plaintiff contends. Whatever laxity there may have been did not extend to the control of firearms. Apart from those issued to the persons on guard duty, all rifles had been securely locked away. The Standing Orders relating to the care of firearms were designed to prevent the negligent use or control of firearms to forestall their landing in the wrong hands rather than their unlawful appropriation and misuse by the soldiers themselves. As pointed out previously, the members of D company were disciplined and experienced soldiers. There was no evidence of any previous misappropriation of rifles at Apex base, and no reason to believe that any members of D company would misappropriate rifles to serve their own ends. There were sentries on duty whose task it was, *inter alia*, to ensure, as far as it could be expected of them to do so, that firearms were not removed from the base without the necessary authority. In the circumstances a reasonable man in the position of those in command would not have foreseen the danger of rifles being removed in the manner in which they were as real enough to have warranted additional precautionary measures to prevent that happening.

[26] In the result the plaintiff failed to establish negligence on the

part of the command structure at Apex base in relation to the harm which he suffered. This brings me to the question whether the defendant can be held vicariously liable for any negligent conduct on the part of the sentries who had been assigned to guard duty.

[27] The crux of the plaintiff's case in this regard is to be found in the amendment to his particulars of claim which was granted during the course of the hearing. It alleges negligence arising from the fact that

> "the defendant's sentries, acting in the course and scope of their employment, failed to prevent the unauthorised departure of troops, a military vehicle and firearms from Apex base."

[28] The allegation appears to be confined to the occasion when Lawerlot left the base in the Samil 50. The evidence indicates that the members of D company who had left the base earlier may not have used the main gate but may simply have crossed over the dilapidated perimeter fence at a convenient spot. If that is so, the sentries at the gate would probably have been unaware of their departure. But even if they had passed through the main gate, as matters stood (there being no specific instructions to the contrary) the sentries had no reason to believe that they were not entitled to go out. They could therefore not be said to have acted unreasonably in letting them through.

[29] It is not alleged, nor is there any direct evidence, that the sentries, with knowledge or foresight of what he was about, co-operated with Lawerlot in allowing him to leave with the Samil 50 and a number of rifles. The reason for this is obvious: if they had so co-operated they would have been acting contrary to their duties and outside the course and scope of their employment by associating themselves with Lawerlot's "frolic of his own". In those circumstances the defendant could not be held legally liable for their conduct. In any event, the defendant was never called upon to meet such a case.

[30] In order to determine whether the sentries failed to act reasonably it is necessary to attempt to establish the circumstances surrounding Lawerlot's departure in the Samil 50. One's task in this regard is made difficult by the fact that none of the sentries was called as a witness.

[31] Lawerlot testified that he left alone in the Samil 50. He further denied that he took any rifles with him. He was found, rightly so, to be an untruthful and unsatisfactory witness. It is not disputed that the soldiers who assaulted the plaintiff were members of D company. Several rifles (the exact number is not known) were seen in their possession. Despite Lawerlot's denial, only he could have been responsible for taking the rifles out of the base in the Samil 50.

[32] Less certain is whether Lawerlot left the base alone or was accompanied by other soldiers. When Lawerlot took the Samil 50 the members of D company who had been involved in the earlier altercation had probably not yet returned. One of the reasons for Lawerlot taking it was to go and pick them up. Lawerlot removed the Samil 50 surreptitiously from outside the hut where Botha was asleep. He could not have done so, and have started it, without assistance. Such assistance must have been forthcoming from persons who had remained at the base and not gone out earlier. It does not necessarily

follow that those who assisted Lawerlot, or some of them, accompanied him when he left the base. What is significant in this regard, however, is that some of the soldiers at the scene where the plaintiff was assaulted were wearing items of military clothing. Yet the soldiers who had earlier left the base were all dressed in civilian clothes. Had those picked up by Lawerlot on his way to Tamboville been the only other persons involved in the assault upon the plaintiff their clothes would not have matched the description given by the witnesses of what some of the assailants were wearing. All of this suggests that Lawerlot probably left the base accompanied by some soldiers who had not been involved in the earlier trouble.

[33] There were six sentries assigned to guard duty that night. Two were on duty at a time while the other four presumably either slept or rested in the guardroom while awaiting their turn of duty. The sentries were the only persons to whom rifles - six in all - had been issued. All other rifles at the base were safely locked away. The rifle used to assault the plaintiff, and any other rifles at the scene, could only have come from those issued to the sentries. The question is, how did this happen?

[34] One explanation, and perhaps the most plausible one, is that the sentries voluntarily co-operated with Lawerlot by handing over their rifles to him - at least those not on guard duty at the time, for the latter are less likely to have relinquished their weapons. If this were so, it is likely that the two on guard were aware of what had happened and associated themselves with the events. To the extent that some or all of the sentries associated themselves with what Lawerlot intended doing, the defendant, as previously pointed out, cannot be held liable for their conduct.

[35] Another conceivable sequence of events is that Lawerlot

managed to obtain possession of the rifles of the off-duty sentries by stealth, and that he left the base without the sentries at the gate suspecting or knowing that there were rifles in the Samil 50. The vehicle was leaving the base, not entering it. Lawerlot would have been known to the sentries as one of the regular drivers. They were under no duty to search the vehicle for rifles. In those circumstances they would have been guilty of no more than a breach of the Standing Orders in permitting the Samil 50 to leave the base without the necessary authority. Unless they knew, or could reasonably have suspected, that there were rifles in the vehicle, they could not have foreseen the reasonable possibility of their conduct causing harm to anyone.

[36] No doubt one of the reasons why there were measures in place to prevent the unauthorised removal of firearms from the base was the danger of their misuse causing injury to someone. If the sentries were aware of the rifles in the Samil 50 (and were not co-operating with Lawerlot) they would have been under a duty to prevent him from leaving with them. How they could have accomplished this is difficult to imagine. Judging by the lengths to which he had gone, Lawerlot was determined to leave with the rifles come what may. Had he defied the sentries if they tried to stop him, and it seems likely that he would have done so, they could have raised the alarm, but it is unlikely that anyone could have prevented the subsequent events from happening. The suggestion that the sentries could have shot Lawerlot is too drastic an alternative to be considered realistic in the circumstances.

[37] I am mindful of the fact that one should not indulge in impermissible speculation. But it is not beyond the bounds of probability that when Lawerlot left the camp (whether alone or accompanied by others) he did so simply under the guise of going to pick up his companions because they had run into trouble. In those circumstances it could hardly be said that the sentries who let him leave, accepting that they had no knowledge of the rifles, acted unreasonably - at least not in a respect causally related to the harm suffered by the plaintiff.

[38] I appreciate that it would have been unrealistic to have expected the plaintiff to have called the sentries as witnesses. But equally there was no obligation on the defendant to do so having regard to the

fact that the *onus* lay on the plaintiff. Bearing in mind the many imponderables, no adverse inference of culpability can arise from the defendant's failure to call them as witnesses, assuming their availability.

[39] To sum up the effect of the aforegoing. The plaintiff had an obvious cause of action against the actual wrongdoers i.e. those soldiers who were directly responsible for his injuries. He chose not to proceed against them personally. Whether this was because he was unable to establish their identity, or unwilling to proceed against them, we do not know. Nor did he seek, correctly so, to hold the defendant, as their employer, vicariously liable for *their* conduct. This is because at the relevant time the soldiers were acting outside the course and scope of their employment i.e. they were not about the business of the Defence Force when they inflicted injury on the plaintiff. What the plaintiff sought to do was to hold the Defence Force liable for the failure of those in command of Apex base to guard against harm of the kind suffered by him. He failed, however, to establish the necessary foresight of the reasonable possibility of such harm on their part. This was a pre-requisite for culpability on their part and liability in respect thereof on the part of the defendant. Nor was the plaintiff

able to establish vicarious liability on the part of the defendant for the conduct of the sentries in not preventing the Samil 50 carrying rifles from leaving the base - either because it was not proved that they acted within the course and scope of their employment at the time or, for want of reasonable foresight of their conduct causing harm to the plaintiff, they had not been negligent in relation to the damage suffered by him.

[40] In the result the plaintiff has failed to establish legal liability on the part of the defendant for his injuries and any damage he may have suffered. The result is socially unfortunate and morally unsatisfactory. However, one cannot allow one's natural sympathy for a litigant to subvert the proper application of accepted legal principle. The court *a quo* expressed the hope that "this case comes to the attention of those responsible in the [Defence Force] for consideration of *ex gratia* payments". I would echo that sentiment.

[41] The appeal is dismissed with costs.

J W SMALBERGER

JUDGE OF APPEAL

VIVIER JA)
HOWIE JA)
)concur
STREICHER JA)
MELUNSKY AJA)