THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

Case no: 213/05

In the matter between:

THE MINISTER OF SAFETY AND SECURITY Appellant

and

ALLISTER ROY LUITERS Respondent

Coram: *Mpati DP, Farlam, Navsa, Cloete et Van Heerden JJA*

Date of hearing: **7 March 2006**

Date of delivery: **17 March 2006**

Summary: Off-duty policeman pursuing persons who had attempted to rob him – whether appellant vicariously liable for the shooting of an innocent third party who was rendered a tetraplegic – answer in the affirmative.

Neutral citation: This judgment may be referred to as *Minister of Safety and Security v Luiters* [2006] SCA 13 (RSA).

JUDGMENT

NAVSA JA

NAVSA JA:

[1] On the night of 14 October 1995, at Eerste River in the Western Province, Constable Lionel Siljeur (Siljeur) fired his service pistol and struck the respondent, Mr Allister Roy Luiters (Luiters), twice from behind, thereby rendering him a tetraplegic. The question for determination in this appeal is whether, at the material time, Siljeur was acting within the course and scope of his employment as a member of the South African Police Service.

[2] Luiters instituted action against the appellant, the Minister of Safety and Security (the Minister) and Siljeur in the Cape High Court for damages sustained as a result of the shooting. Shortly before the trial began, Luiters withdrew the action against Siljeur and proceeded only against the Minister. The remaining parties were agreed, and the court below ruled, that the question of the Minister's liability would be determined first and that the other issues should stand over for later determination. Thring J, who heard the matter, had regard to the evidence of a material witness who testified that he had been told by Siljeur (shortly after the respondent had been shot), that Siljeur was in pursuit of persons who had attempted to rob him. He concluded that Siljeur had been going about police business at the time of the shooting and had therefore acted within the course and scope of his employment. Thring J held that the Minister was consequently vicariously liable and ordered him to pay the costs of the hearing before him.

[3] It is against these conclusions that the appellant appeals with the leave of the court below.

[4] It is common cause that, flowing from the events on the night in question,

Siljeur was convicted in the Parow Regional Court, on 24 August 1998, on eight counts of attempted murder.

[5] It is necessary, at this stage, to consider the material parts of the evidence adduced in the court below. Three witnesses testified. Mr William Richard Davidse (Davidse) was the first. On the night in question, he was driving two friends in his motor vehicle to visit someone in Eerste River when they encountered Siljeur in Jacaranda Street. Siljeur came running towards their vehicle with his service pistol in his hand. They stopped and asked him what the problem was. He replied that someone had attempted to rob him and asked them whether they had seen where the robbers had run to. He said he was looking for the robbers who had run into premises nearby, across the road from the house situated at 2 Jacaranda Street. Davidse asked Siljeur to lower the firearm which had been pointed at him for a considerable time. One of Davidse's friends, who had some knowledge of firearms, had told him, shortly before Siljeur spoke to them, that the gun he was brandishing was of the kind used by members of the South African Police Service. Davidse had been relieved when he heard this. According to Davidse, during this initial approach, Siljeur 'looked like he wanted to arrest people'.

[6] Davidse testified that he had suggested to Siljeur that he go home and, shortly thereafter, had seen the latter move past the back of the motor vehicle. Davidse and his friends travelled a little further down Jacaranda Street and they saw Luiters lying in a pool of blood. At the time he was unknown to them. In the vicinity Davidse heard a woman screaming Luiters' name hysterically. The woman was standing behind a fence on premises close to where Luiters was lying. Davidse's friends got out of the car to tend to Luiters. Almost immediately thereafter, Davidse heard gunfire. His friends took cover as he drove a short distance down the street with his motor vehicle's lights switched off.

[7] Davidse then drove back to where his friends were and saw Siljeur

walking down the middle of the street, shooting at them. They returned fire. Davidse stopped his motor vehicle where Luiters lay in the street. Siljeur then disappeared.

[8] Luiters testified and described how he had been shot. He was accompanied by two women on his way to 2 Jacaranda Street, walking in the opposite direction to that from which Davidse later drove, to collect his motor vehicle from someone there who had borrowed it. As they entered Jacaranda Street, the women accompanying him shouted that they should run. Whilst the three of them were fleeing, Luiters was struck by bullets from behind and fell in Jacaranda Street. Luiters did not see who had shot him.

[9] The only witness who testified in support of the Minister's case was Captain Andre Steenkamp (Steenkamp), who at that time, was stationed at the Goodwood detective branch of the South African Police Service. He was called to the scene on the night in question and found Luiters lying in the street. From information he gathered from people in the vicinity, he determined that the person who had shot Luiters was a policeman. He described how he had arrested Siljeur the following day and testified about the training that the police received in the use of firearms and about the reports they had to file after discharging their firearms. Siljeur had not filed such a report. Steenkamp testified further that the police could only use their firearms in accordance with their standing orders and the Criminal Procedure Act 51 of 1977. Steenkamp testified that it was clear from Davidse's evidence that Siljeur had used his firearm in a manner contrary to the standing orders and the said Act. According to Steenkamp, when he first approached Siljeur, the latter denied his own identity and that he was a policeman. He also initially refused to hand over his service firearm.

[10] It is common cause that Siljeur was officially off-duty at the relevant time. As recorded in the judgment of the court below, Steenkamp conceded that a member of the South African Police Service could, in terms of the police standing orders, at any time place himself on duty when an offence has been committed.

[11] A relevant standing order, to which Steenkamp was referred, reads as

follows:

'When a member is required to perform duties in a neighbourhood or in circumstances perilous to life, he shall be adequately armed for self-preservation or the protection of life and property. He must not, where necessary, hesitate to make use of his arm.'

[12] That, then, was the material evidence on which the court below was required to determine the question of the Minister's liability. Siljeur was in attendance at the trial under subpoena from Luiters. He was, however, not called to testify in support of the latter's case. Siljeur was released as Luiters' witness but the Minister did not use the opportunity to call him as a witness.

[13] Determining, particularly in the case of the misdeeds of members of the South African Police Service, whether the Minister should be held vicariously liable, has often presented courts with the difficulty of where to draw the line in such terms so as not to cause future confusion and to ensure an orderly development of our jurisprudence.[1]

[14] In *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), the Constitutional Court, in considering delicts committed in the course of a deviation from the normal performance of an employee's duties, had regard to common-law principles of vicarious liability and cited *dicta* from this court's judgment in *Feldman (Pty) Ltd v Mall* 1945 AD 733.[2]

[15] In the *Feldman* case, Watermeyer CJ said the following at 742:

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

(a) If he abandons his master's work entirely in order to devote his time to his own affairs then his master may or may not, according to the circumstances, be liable for harm which he causes to third parties. If the servant's abandonment of his master's work amounts to mismanagement of it or negligence in its performance and is, in itself, the cause of harm to third parties, then the master will naturally be legally responsible for that harm; there are several

[1] *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK* 2002 (5) SA 475 (SCA) para [11], *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC) para [7].

[2] Paras 27, 28 and 29.

English cases which illustrate this situation and I shall presently refer to some of them. If, on the other hand, the harm to a third party is not caused by the servant's abandonment of his master's work but by his activities in his own affairs, unconnected with those of his master, then the master will not be responsible.

(b) If he does not abandon his master's work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs.'

[16] At 744 of the same judgment, Watermeyer CJ continued:

'This qualification is necessary because the servant, while on his frolic may at the same time be doing his master's work and also because a servant's indulgence in a frolic may in itself constitute a neglect to perform his master's work properly, and may be the cause of the damage.'

[17] Tindall JA's approach to the matter in the same case (at 756-757) was also referred to by the Constitutional Court. He said the following:

'In my view the test to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time that it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case the master is not liable. It seems to me not practicable to formulate the test in more precise terms; I can see no escape from the conclusion that ultimately the question resolves itself into one of degree and in each particular case a matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed.'

[18] In subsequent cases variations of the approach suggested in these passages have been adopted and applied. In *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 134C-E, this court formulated a test for determining vicarious liability which has since been applied:

'It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention . . . The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.'[3]

[19] In the *K* case,[4] supra, the Constitutional Court stated that this approach made it clear that there are two questions to be asked:

[3] In the *K* case, the Constitutional Court pointed out (at footnote 39) that, although the *Rabie* judgment was criticised in a later judgment of this court (*Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 832B-D), its statement of the standard test was not directly criticised.

[4] Para 32.

'The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is "sufficiently close" to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights.'

[20] In order to address the first question it is necessary to consider Siljeur's state of mind at the relevant time. Thring J considered Siljeur's statement to Davidse ─ that he was looking for persons who had attempted to rob him ─ to be spontaneous and contemporaneous enough to warrant a conclusion that it was indicative of his intention to perform police duties. The admissibility of that statement was not challenged on behalf of the Minister ─ the inference drawn from the statement by the court below is what is in contention. The learned judge reasoned as follows:

'Soos ek reeds gesê het, sy woorde is myns insiens meer aanduidend van 'n bedoeling aan sy kant om polisiedienste uit te voer as om hom met sy private belange, soos byvoorbeeld wraak te bemoei. Dit is na my oordeel waarskynlik dat hy op die eiser geskiet het omdat hy hom as een van die rowers beskou het, of as 'n medepligtige van die rowers, en dat hy teen hom so opgetree het sodat hy hom kon aankeer en in hegtenis kon neem. Met die aankoms van Davidse en sy twee passasiers, wat hy ook as medepligtiges van die rowers aangesien het, het hy egter dalk van plan verander.'

[21] The court below concluded that Luiters had proved, on a balance of probabilities, that Siljeur acted within the course and scope of his employment and that consequently, prima facie, the Minister was liable. The court below said that the Minister could only avoid liability by showing that at the relevant time Siljeur was acting outside the ambit of his employment.[5] In the absence of such countervailing evidence the court below held the Minister liable.

[22] Counsel for the Minister submitted that Siljeur had not been about police business and that this could be deduced from the manner in which he behaved at

[5] In this regard Thring J referred to *Mhlongo & others v Minister of Police* 1978 (2) SA 551 (A). In light of the facts of the present case it is not necessary to deal with any subsequent evolution in case law in respect of the assessment of evidence in this regard.

the material time. It was submitted that he was acting in a bizarre manner ─ that he had run amok, shooting randomly and inexplicably and that this behaviour was not that of a policeman in search of robbers. Thus it was submitted the conclusion that Siljeur had been acting in the course and scope of his employment was not justified.

[23] In the present case there was a confluence between Siljeur's interest and those of the South African Police Service. Although he personally was subjected to an attempted robbery, Siljeur, in approaching Davidse and his companions certainly appeared to be acting with the authority of a policeman. From the words he uttered to them it was clear that his purpose was the pursuit of the persons who had attempted to rob him. In pursuing the persons who had attempted to rob him, he could hardly be unmindful of his authority as a policeman. After all, he was using his service pistol.

[24] I do not agree with the submission by counsel for the Minister, that Siljeur's shooting at Luiters and his companions, and later at Davidse and his companions, evinced wild, inexplicable behaviour, unconnected to police duties. It will be recalled that Luiters and his two female companions had fled and that Luiters had been struck whilst he was fleeing. It is not unlikely that Siljeur considered them to be associated with those who had attempted to rob him. He had told Davidse and his companions that the persons who had robbed him had fled into premises close by. One of Luiters' companions *had* sought refuge in premises close by and was screaming there when Davidse first noticed her. It is clear from the manner in which Siljeur approached Davidse and his companions that he was not entirely convinced that they were unconnected to the persons who had attempted to rob him. His suspicions in this regard must have been heightened when Davidse's motor vehicle, with the lights switched off, stopped alongside Luiters where he lay in the street. Siljeur's failure to tend to Luiters and his subsequent approach to Davidse and his companions cumulatively indicate that he was concerned about the presence of 'other' would-be robbers, whom he

associated with Luiters.

[25] It is against this background that Siljeur's behaviour should be seen. It is therefore not, as submitted by counsel for the Minister, inexplicable. If Siljeur had been engaged in a wild shooting spree he would, on the probabilities, not have been cautious in his initial approach to Davidse and his companions, nor would he have stated his purpose.

[26] In my view, the court below, in considering the first question postulated in the *K* case, answered it correctly. I can find no flaw in the reasoning of Thring J in this regard.

[27] It was submitted by counsel representing the Minister that Siljeur's failure to report the matter, his initial lies about his identity and denial that he was a policeman as well as his refusal to hand over the firearm are destructive of the notion that he executed police duties at the time of the shooting. I disagree. These facts are equally consistent with an inference that he was intent on putting distance between himself and the shooting.

[28] Having regard to the *dicta* cited earlier, the fact that, in pursuing the would-be robbers and thereafter, Siljeur did not strictly adhere to the police standing orders or the provisions of the Criminal Procedure Act, does not excuse the Minister from liability. The law reports are replete with instances where the State was held liable for negligent and improper performance by a servant of his tasks or duties.

[29] For the reasons stated the appeal is dismissed with costs.

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M S NAVSA

JUDGE OF APPEAL

CONCUR:

MPATI DP
FARLAM JA
CLOETE JA
VAN HEERDEN JA